Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

Treasury Decisions

19 CFR Part 134

(T.D. 89–88)

RIN 1515–AA66

CUSTOMS REGULATIONS AMENDMENT RELATING TO COUNTRY OF ORIGIN MARKING OF NATIVE AMERICAN-STYLE JEWELRY

AGENCY: U.S. Customs Service.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations concerning the country of origin marking requirements for certain categories of merchandise. Specifically, this change adds to those categories imported jewelry in Native American styles, and requires for this jewelry more permanent methods of marking. The purpose of these requirements is to prevent the misrepresentation of imported Native American-style jewelry as genuine Native American Jewelry. The changes require that Native American-style jewelry be indelibly marked with the country of origin by cutting, die-sinking, engraving, stamping, or some other equally permanent method, or with a similarly marked plastic or metal tag. Adhesive labels or string tags will be permitted only when indelible marking is technically or commercially infeasible.

EFFECTIVE DATE: This amendment is effective with respect to merchandise entered or withdrawn from warehouse for consumption on or after October 27, 1989.

FOR FURTHER INFORMATION CONTACT: Lorrie Rodbart, Value, Special Programs & Admissibility Branch, U.S. Customs Service (202) 566–1765.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 304 of the Tariff Act, as amended (19 U.S.C. 1304), generally requires that every article of foreign origin imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article will permit in a manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article. Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304.

The Customs Service normally permits any reasonable method of marking that will remain on the article during handling until it reaches the ultimate purchaser (19 CFR 134.41 and 134.44). This includes the use of paper sticker labels and string tags. However, where it is shown that a particular method of marking is not sufficiently permanent to inform the ultimate purchaser of the country of origin of the article, the Custom Service may require another type of marking which will insure that in all foreseeable circumstances, the article will reach the ultimate purchaser with its country of origin marking intact.

An initial notice of proposed rulemaking requiring more strict methods of marking for Native American-style jewelry was published by the Customs Service in the Federal Register on July 15, 1986 (51 FR 25574). This was in response to allegations by representatives of the Native American handicraft industry that some jewelry and craft dealers and wholesalers remove country of origin labels from imported goods and sell them as authentic Native American products. While comments resulting from that notice were still being evaluated, the same problem was addressed in the Omnibus Trade and Competitiveness Act of 1988 enacted on August 23, 1988 (Pub. L. 199–418). Section 1907(c) of that act requires the Secretary of the Treasury to prescribe and implement within 1 year of enactment regulations which require indelible and permanent country of origin marking to the greatest extent possible on all imported Native American-style jewelry and arts and crafts.

A second notice of proposed rulemaking more specifically addressed to the statutory mandate was published in the Federal Register on February 10, 1989 (54 FR 6418). That notice contained a discussion of the comments received in response to our earlier notice, many of which favored extending the proposal to include either all jewelry or all silver jewelry, and noted that the requirements with respect to Native American-style arts and crafts would be dealt with in a separate rulemaking procedure. Also, refer to that notice and the following information for more details concerning the nature of our changed marking requirements for Native American-style jewelry.

Analysis of Comments

Customs requested comments on three alternative approaches to implementation of the statutory requirement that all Native American-style jewelry be permanently and indelibly marked with the country of origin: (1) require indelible marking on Native American-style jewelry only (this is the proposal on which comments were previously received and would include imported jewelry that incorporates traditional Native American design motifs, materials, and/or construction); (2) require indelible marking on all silver and silver alloy jewelry and other jewelry that looks like Native American; and (3) require indelible marking on all jewelry without any reference to its relationship to Native American-style.

Although Customs proposed the third option, we indicated that the final decision would be based on the weight of the evidence. Comments were also requested concerning the additional costs that may be imposed on consumers, importers, and others affected directly by the proposed marking requirements and ways in which the proportion of jewelry items subject to marking could be reduced while accomplishing the statutory objective of ensuring the permanent marking of imported Native American-style jewelry.

In response to the notice, 73 written comments were received. The largest group of commenters (46) favored the permanent marking of only Native American-style jewelry, 26 commenters favored the permanent marking of all foreign-made jewelry, and two commenters favored indelible marking of silver and silver alloy jewelry.

Commenters Favoring Indelible Marking of All Jewelry

Some of the commenters who favor indelible marking of all jewelry state that they do so because of the difficulty in separating Native American-style jewelry from other jewelry styles. The Department of the Interior, Indian Arts and Crafts Board, indicates that any definition of Native American-style jewelry that is based on design characteristics, materials, or on a specific list of products is doomed to failure because contemporary craftsmen necessarily develop new approaches to their art. Other commenters expressed similar concerns. The option to require indelible marking on all jewelry purportedly avoids the definition problem and also covers all jewelry that might be misrepresented as Native American. The Indian Arts and Crafts Board is also of the opinion that requiring indelible marking of all silver or silver alloy jewelry, does not go far enough since Native American craftsmen are increasingly making use of gold, brass, and other materials and that, therefore, this approach does not satisfy the statutory mandate that indelible marking of Native American-style jewelry be required "to the greatest extent possible."

Although most commenters who favored indelible marking of all jewelry do so because of their concerns about imported Native American-style jewelry, a few commenters indicate that this ap-

proach is necessary to address problems associated with the marking of all styles of jewelry, including items that are not Native American-style. One trade association of domestic jewelry manufacturers and their suppliers cites a study undertaken by the Customs Service in 1986 which showed a 21 percent marking violation rate for imported jewelry. Because the study was based on cargo examination at ports of entry, the association contends that it did not reveal the equally significant problems following entry of the jewelry when impermanent labels are removed. It claims that the indelible marking of all jewelry would eliminate the opportunity for deception, benefit the domestic industry and fully inform the consumer. One commenter supporting the proposal to require indelible marking on all jewelry states that tags will be removed before sale and notes that there are available technologies to mark all jewelry indelibly. Some commenters indicated that this option should be adopted just because the public needs to know the country of origin.

Commenters Favoring Indelible Marking of All Silver and Silver Alloy Jewelry

Two commenters favor this option because it would be a first step in protection of Native American artists.

Commenters Favoring Indelible Marking of Only Native American-Style Jewelry

1. *This approach is in accordance with congressional intent:*

Most of the commenters favoring this approach are importers and retailers of both fine and costume jewelry. Some comments were also received from foreign governments and United States government agencies. The major reason cited by the commenters for limiting the regulation to Native American-style jewelry, as opposed to all jewelry or all silver and silver alloy jewelry, is that this is in accordance with congressional intent, as expressed in Section 1907(c) of the Omnibus Trade and Competitiveness Act of 1988. According to the commenters, the statutory language is clear and unambiguous with regard to the fact that the only type of imported jewelry that must be indelibly marked to indicate its country of origin is Native American-style jewelry, and that any application of this provision to all imported jewelry is inconsistent with the statutory language.

These commenters also indicate that requiring indelible marking on all jewelry would not further legislative intent because the bulk of imported jewelry cannot be mistaken for Native American jewelry. Several commenters indicated that only a minute segment of the imported jewelry could possibly be mistaken for Native American jewelry.

2. *Indelible marking is more costly than presently used permissible methods:*

Most of the commenters opposed to indelible marking of all jewelry indicated that indelible marking of jewelry would be far more costly than the methods permitted now (*i.e.*, adhesive labels and hang tags), ultimately resulting in higher resale prices. According to the commenters, the higher costs are due primarily to the costs to obtain needed dies and in applying them and the costs of permanently attaching metal or plastic tags to pieces which will not accommodate indelible marking themselves. One commenter indicated that fine jewelry generally cannot be marked by standard tooling and must be done by hand resulting in greater labor costs. One retailer estimates that additional piece marking would increase the cost between $.15 to $.50 per piece for fine gold jewelry requiring a ling or tag. According to some costume jewelry importers, the cost to indelibly mark these items would be prohibitive, noting that in some cases, the marking could cost more than the article itself. One commenter indicates that a single company could require as many as 100 new molds.

According to a cost/benefit analysis submitted by the Federal Trade Commission, indelible marking of all jewelry would result in increased costs to manufacturers and importers and little corresponding increased benefits for consumers. The FTC indicates that since the volume of jewelry imported into the United States is very large, the aggregate costs (of marking all jewelry) to the manufacturers, and ultimately to consumers, will be substantial even if the costs per price are modest. It is also noted that in some instances the act of stamping the items (if the alternative of affixing a metal or plastic tag permanently is not feasible) may damage the item, in which case its value would be reduced and the effective cost of stamping would be increased. Finally, the FTC states that they have learned that at least some foreign manufacturers probably do not have the equipment that would be needed to mark items permanently.

3. *Present methods of marking are adequate:*

Another argument of those commenters opposed to indelible marking of all jewelry is that the present methods of marking are adequate to inform the ultimate purchaser of the country of origin. They contend that the proposal to require indelible marking of all jewelry is overboard and unnecessarily targets a general class of merchandise for special marking requirements without a requisite showing that the existing methods are inadequate. The commenters point out that for many years jewelry has been marked by means of stickers and tags without complaints. In fact, they note that Customs has recognized in rulings that a hang tag affixed to an article of jewelry may be a more conspicuous and legible method of marking than small lettering on the article itself. Therefore, it is argued

that the proposed regulations may actually be less effective in informing the ultimate purchaser than the present method of marking the country of origin.

Many of these commenters also point out that there are sufficient safeguards and remedies under existing laws regarding misrepresentation or the intentional removal of the country of origin marking. They indicate that any misrepresentation of the place of origin is an unfair trade practice in violation of 15 U.S.C. 41 *et seq.* and that the intentional removal of the requisite country of origin marking is a criminal offense under 19 U.S.C. 1304(h).

4. *Practical problems of broad option:*

Another criticism raised by many commenters is that indelible marking would have an adverse effect on the aesthetic appearance of quality imported jewelry. It is feared that conspicuous marking might be seen when the piece of jewelry is worn, especially when the marking is affixed by means of a metal tag. Due to the aesthetic nature of jewelry articles, it is argued that marking by means of a removable hang tag, label or sticker is more practical than indelible marking.

Many commenters also indicated that most pieces cannot accommodate indelible marking. One large importer and retailer of costume jewelry indicates that the majority of pieces have no surfaces large enough to permit country of origin marking and that much jewelry cannot accommodate indelible marking for other reasons, *e.g.*, it is hollow or the piece is too delicate. Importers and retailers of fine jewelry inform us that the stamping of delicate and hollow items would damage the jewelry, and that the items are already marked with a trademark and quality markings so there is little room, if any, to mark the country of origin on a clasp or bezel. In addition, we are told by importers of costume jewelry that many of the materials used, such as bone, onyx and glass, do not lend themselves to permanent marking, regardless of the surface size.

Several commenters indicate that permanent tags will interfere with the aesthetic display and prevent customers from trying jewelry on before purchase. The tags will allegedly detract from the appearance of the jewelry and put it at a competitive disadvantage to jewelry that is not so marked.

Another practical problem associated with the use of metal tags concerns weighing of jewelry. Several commenters indicated that a piece could not be properly weighed with a tag attached.

5. *Requiring indelible marking on all imported jewelry would increase trade friction:*

Finally, several commenters, including the U.S. Trade Representative, the Delegation of the Commission of the European Communities, and some foreign governments indicate that requiring indelible marking on all jewelry would be inconsistent with international trade obligations and could be considered an unjustified trade barri-

er under the General Agreement of Tariffs and Trade. The FTC comments that a requirement to indelibly mark all jewelry could increase trade frictions because foreign countries could interpret increased marking required by Customs as an effort to exclude or increase the cost of imported jewelry under the guise of a consumer protection policy.

Customs Position

After considering all the comments, we have determined that Customs regulatory efforts should focus on the problem that has been identified relating to Native American-style jewelry.

First, it is unnecessary to require indelible marking on all imported jewelry in order to satisfy, § 1907(c) of the Omnibus Trade and Competitiveness Act of 1988. This provision only pertains to the marking of Native American-style jewelry, not all jewelry. In addition, § 1907(c) requires that the regulations provide for the indelible marking of such jewelry *to the greatest extent possible.* Congress recognized by these words that there may be some practical limitations to be considered.

We believe that many of the concerns raised about indelible marking of all jewelry are legitimate. This type of marking will undoubtedly raise costs to both manufacturers and consumers, detract from the aesthetic appearance of the jewelry, and will, in some cases, result in marking which is more difficult to see than the present methods of marking. Considering the fact that the amount of imported jewelry which looks like Native American-style jewelry is small, the cost of requiring indelible marking on all jewelry is unwarranted.

Second, Customs agrees with those commenters who state that the present enforcement tools are generally sufficient to ensure that imported jewelry complies with the marking laws (*e.g.*, the issuance of marking notices, the assessment of marking duties, assessment of liquidated damages where improperly marked merchandise is not redelivered to Customs, and criminal penalties for the intentional removal of the required marking). Although Customs reported a high violation rate regarding country of origin marking of jewelry in 1986, since then, because of increased marking enforcement by Customs, we believe that this problem has been greatly reduced.

It should also be noted that out proposal to extend the indelible marking requirements to *all* jewelry was not based on evidence that the present method of marking all types of jewelry was not adequate, but rather, on a preliminary determination that the term "Native American-style" jewelry was not readily definable. For the reasons explained in the next section on identifying Native American-style jewelry, we are limiting this term to jewelry which incorporates "traditional" Native American design motifs, materials and/or construction. This approach greatly reduces the definition

problem and is consistent with the legislative mandate to require indelible country of origin marking on Native American-style jewelry to the greatest extent possible.

Finally, we are of the opinion that absent a compelling reason for requiring indelible marking, tags or stickers are the preferable method of marking jewelry because they can be more readily seen by the consumer. In addition, they eliminate most of the practical problems associated with indelible marking of jewelry noted above. Of course, under present regulations, if Customs determines that in a given case the paper label or tag is not sufficiently permanent to reach the ultimate purchaser based on normal handling of the item, a more permanent method would be required.

In view of allegations by some commenters that the country of origin marking on imported jewelry is not reaching ultimate purchasers, Customs will continue to closely monitor the way jewelry is marked. Continued enforcement by Customs, accompanied by an increased public awareness of the country of origin marking requirements of jewelry resulting from the Federal Register notices, should also lead to a higher rate of compliance. While we are unaware of any specific instances of removal of country of original marking, any information of this nature should be reported to Customs and the Federal Trade Commission for appropriate action.

In light of the numerous concerns raised about indelible marking of all jewelry, the fact that Congress determined that special marking requirements were warranted with respect to Native American-style jewelry only, and the fact that imported Native American-style jewelry which looks like jewelry made by Native Americans constitutes a small segment of imported jewelry, the requirement of indelible and permanent marking for jewelry is limited to Native American-style jewelry.

Identifying Native American-Style Jewelry

Section 1907(c) requiring the implementation of regulations concerning country of origin marking of Native American-style jewelry resulted from a Senate floor amendment to the trade bill. In the discussion preceding the adoption of that amendment, Senator Domenici, the amendment's sponsor, inserted into the *Congressional Record* the following statement which he said was designed to provide guidance to Customs in defining Native American handicrafts:

> The most appropriate definition of what is *genuine* Native American handicraft product (arts, crafts, and jewelry) is found in 25 CFR 308.3a (emphasis added). It reads as follows:
>
> > objects produced by Indian craftsmen with the help of only such devices as allow the manual skill of the maker to condition the shape and design of each individual product.
>
> The regulations proposed by the U.S. Customs Service in 1986 contain appropriate descriptive information regarding Native American arts, crafts and jewelry.

> While is is clear that a detailed description of what these items look like is helpful to a Customs agent, such descriptions cannot be all encompassing. The thrust of the amendment is to ensure that consumers may distinguish between authentic Native American products and the look-alike from around the world.
>
> The U.S. Customs Service is encouraged to coordinate with the Department of Interior, Bureau of Indian Affairs to ensure that the intent of this provision is carried out. 133 Cong. Rec. S9443–4 (daily ed. July 8, 1987).

The definition of a *genuine* Native American handicraft found in 25 CFR 308.3(a), is a combination of the producer of the product (Indian craftsmen) and the method of production (with the help of only such devices as allow the manual skill of the maker to condition the shape and design of each individual product). We do not find this definition to be instructive in defining "Native American-style jewelry" as that term is used in § 1907(c).

First, the thrust of § 1907(c) is to require indelible marking on imported goods which look like jewelry made by Native Americans but in fact were *not* produced by Native Americans. Second, unlike genuine Native American handicrafts which are by definition produced with the help of only such devices as allow the manual skill of the maker to condition the shape and design of each individual product, as the legislative history makes clear, imported articles which look like Native American jewelry may have been mass produced rather than handcrafted. Thus, neither portion of the definition regarding the producer of the product nor the method of production is helpful in identifying imported Native American-style jewelry.

Considering the purpose of § 1907(c), which is to ensure that consumers can distinguish between genuine Native American products and imported look-alikes, the final regulation will define Native American-style jewelry as: jewelry which incorporates traditional Native American design motifs, materials and/or construction and therefore, looks like, and could possibly be mistaken for, jewelry made by Native Americans. While we recognize that not all genuine Native American jewelry incorporates "traditional" design motifs, materials and/or construction, we are of the opinion that it will be the more traditional styles that sellers will try to pass off as authentic goods, the styles that consumers generally associate with Native American jewelry.

Numerous comments were received concerning the identification of traditional Native American-style jewelry. They indicate that most of this jewelry is plain silver or silver set with blue or green opaque material. Other commenters indicated that the pieces could also contain coral, onyx, lapis and the like. Regarding construction, a few commenters indicated that Native American-style jewelry gives the appearance of being crudely finished and is hand soldered and hand polished. Based on these comments, we anticipate that most of the imported jewelry that will be subject to these require-

ments will be silver-colored jewelry which is either plain or set with opaque blue or green stones, and which gives the appearance of being hand made.

The regulation, however, will not specify the characteristics of "traditional Native American-style" jewelry since those characteristics are likely to change over a period of time. While consumers presently are most likely to mistake silver jewelry with blue or green opaque stones as genuine Native American, this may not always be the case. Customs will issue guidelines to be used by importers and field officers in identifying imported Native American-style jewelry. As the need arises, the guidelines will be amended.

ADDITIONAL CHANGES TO THE PROPOSED REGULATION

EXCEPTION TO INDELIBLE MARKING REQUIREMENT

The proposed regulation states that a string tag or adhesive label would be permitted as the only means of marking in the case of those few articles which are too small to be indelibly marked and do not permit the permanent attachment of a metal or plastic tag. Several commenters suggested that the structural characteristics as well as size of the jewelry should be considered in any indelible marking exceptions. For example, we are told that some jewelry is hollow and cannot be indelibly marked. Some suggest that allowance should be made for situations where permanent marking would be impractical, unreadable or ruin the value of the article. We believe these suggestions have merit and the final regulation permits marking by paper label or string tag where it would be technically or commercially infeasible to mark by the methods generally required for Native American-style jewelry.

The proposed regulation requires that where the indelible country of origin marking is necessarily so small that it can only be read with a magnifying glass, an additional country of origin adhesive label or hang tag be attached. Several commenters question why the indelible marking should be required at all when it is necessarily so small that it can only be read with a magnifying glass. It is argued that in such circumstances, the adhesive sticker or hang tag alone is sufficient.

The reason for requiring both methods of marking was to assure that the ultimate purchaser would be able to determine (albeit with difficulty) the country of origin even if the paper marking was removed. Upon reconsideration, we believe that this added precaution is not necessary since the use of paper labels is permitted in only those few cases where it is not possible to either legibly mark the item itself or to permanently attach a metal or plastic tag to the item. The final regulation is changed accordingly.

Finished Jewelry vs. Components

Several commenters asked if the regulation will apply to imported jewelry components in addition to finished jewelry. As explained below, imported components that will be substantially transformed in the United States prior to retail sale will not be subject to the regulation. Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), the statute requiring country of origin marking, also specifies various exceptions from marking. For example, § 304(a)(3)(D) provides for an exception from marking an imported article if the marking of its container will reasonably indicate the country of origin to the ultimate purchaser. It is well established that imported articles which are to be substantially transformed in the United States prior to retail sale are excepted from individual marking under this provision. In such circumstances, the United States manufacturer that substantially transforms the article is considered the ultimate purchaser and the marking of the container instead of the article itself is permitted pursuant to § 304(a)(3)(D).

The country of origin marking regulations, including the regulation on Native American-style jewelry, cannot override the statutory exceptions. Therefore, this regulation is subject to the statutory exceptions, including § 304(a)(3)(D). We are clarifying the final regulation on this point.

Miscellaneous Comments

Several commenters suggested that all genuine Native American jewelry be marked with its own certifying mark to assure its authentically and that the industry adopt a public relations program encouraging consumers to look for this mark. Another commenter suggested that all American jewelry be marked "made in USA". These comments go beyond both the scope of the notice and Customs Authority. We note however that a certifying mark on both the traditional and more contemporary styles of Native American jewelry would provide an alternative means for the consumer to identify genuine Native American jewelry and would alleviate some of the concerns that have been expressed regarding our decision to limit the requirements of § 134.43(c) to "traditional" Native American-style jewelry.

Finally, several commenters suggested that there should be a way for an importer to determine in advance whether jewelry to be imported is considered Native American-style jewelry and subject to the special marking requirements. In accordance with the provisions of Part 177, Customs Regulations (19 CFR Part 177), an importer or other interested party may request a ruling from Customs on this question with respect to any prospective transaction.

For the foregoing reasons, the proposed changes are adopted as modified.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the regulation amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

DRAFTING INFORMATION

The principal author of this document was James C. Hill, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR 134

Customs duties and inspection, Labeling, Packaging and containers.

AMENDMENT TO THE REGULATIONS

PART 134—COUNTRY OF ORIGIN MARKING

1. The authority citation for Part 134 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General Note 8 Harmonized Tariff Schedule of the United States), 1304, 1624.

2. Section 134.43 is amended by adding a new paragraph (c) to read as follows:

§ 134.43 Methods of marking specific articles.

*   *   *   *   *   *   *

(c) *Native American-style jewelry.*

(1) *Definition.* For the purpose of this provision, Native American-style jewelry is jewelry which incorporates traditional Native American design motifs, materials and/or construction and therefore looks like, and could possibly be mistaken for, jewelry made by Native Americans.

(2) *Method of Marking.* Except as provided in 19 U.S.C. 1304(a)(3) and in paragraph (c)(3) of this section, Native American-style jewelry must be indelibly marked with the country of origin by cutting, die-sinking, engraving, stamping, or some other equally permanent method. The indelible marking must appear legibly on the clasp or in some other conspicuous location, or alternatively, on a metal or plastic tag indelibly marked with the country of origin and permanently attached to the article.

(3) *Exception.* If it is technically or commercially infeasible to mark in the manner specified in paragraph (c)(2) of this section, the article may be marked by means of a string tag or adhesive label securely affixed, or some other similar method.

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: September 21, 1989.
SALVATORE R. MARTOCHE,
Assistant Secretary of the Treasury.

[Published in the Federal Register, September 27, 1989 (54 FR 39520)]

(T.D. 89–89)

SYNOPSES OF DRAWBACK DECISIONS

The following are synopses of drawback authorizations issued April 26, 1989, to August 23, 1989, inclusive, pursuant to Subpart C, Part 191, Customs Regulations; and approvals under Treasury Decision 84–49.

In the synopses below are listed for each drawback rate approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner to whom the rate was forwarded, and the date on which it was issued.

Date: September 25, 1989.
DRA-1-09
File: 221755

JOHN DURANT,
Director,
Commercial Rulings Division.

(A) Company: American Magotteaux Corp.
Articles: Steel and iron castings
Merchandise: High carbon ferrochrome; low carbon ferrochrome
Factory: Pulaski, TN
Statement signed: July 8, 1988
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, July 3, 1989

(B) Company: Cape Industries
Articles: Dimethyl terephthalate (DMT)
Merchandise: Methanol; para-xylene
Factory: Wilmington, NC
Statement signed: February 24, 1989
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Rate forwarded to RC of Customs: New York, May 25, 1989
Revokes: TD 87–102–E

(C) Company: Cargill, Inc.
Articles: Corn gluten meal; corn gluten feed, crude corn oil; corn syrup; high fructose corn syrup; corn starch
Merchandise: Yellow dent corn
Factories: Dayton, OH; Memphis, TN; Cedar Rapids & Eddyville, IA
Statement signed: March 9 1989
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Rate forwarded to RC of Customs: Chicago, July 14, 1989

(D) Company: Cargill Citro-America, Inc.
Articles: Orange juice from concentrate; frozen concentrated orange juice; bulk concentrated orange juice
Merchandise: Concentrated orange juice for manufacturing
Factory: Elizabeth, NJ
Statement signed: October 14, 1988
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, April 26, 1989

(E) Company: Cargill Citro-America, Inc.
Articles: Flavored concentrates and juices
Merchandise: Concentrated orange juice for manufacturing
Factory: Elizabeth, NJ
Statement signed: October 14, 1988
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, April 26, 1989

(F) Company: C-I-L Corporation of America
Articles: Anthraquinone dispersions
Merchandise: Anthraquinone
Factory: Charlotte, NC
Statement signed: November 11, 1988
Basis of claim: Used in
Rate forwarded to RC of Customs: Chicago, August 23, 1989

(G) Company: Cosan Chemical Corp.
Articles: Phenylmercuric acetate formulations; organomercurial catalysts; phenylmercuric oleate formulations; phenylmercury formulations
Merchandise: Mercuric oxide (red); mercuric oxide (yellow); mercury metal
Factory: Carlstadt, NJ
Statement signed: January 11, 1989
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, June 26, 1989

(H) Company: Diaz Chemical Corp.
Articles: 2-bromopyridine
Merchandise: 2-chloropyridine
Factory: Holley, NY
Statement signed: June 1, 1988
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Boston, August 1, 1989

(I) Company: E. I. du Pont de Nemours and Co., Inc.
Articles: Polyester urethane resin (RC–H–70740)
Merchandise: Tri-methyl-hexamethylene diisocyanate (TMDI) a/k/a G–872
Factory: Fort Madison, IA
Statement signed: October 31, 1988
Basis of claim: Appearing in
Rate forwarded to RCs of Customs: New York & Boston (Baltimore Liquidation), July 17, 1989

(J) Company: E. I. du Pont de Nemours and Co., Inc.
Articles: Tetraethyl lead (TEL) antiknock compounds
Merchandise: Ethyl chloride a/k/a chloroethane
Factory: Deepwater: NJ
Statement signed: February 27, 1989
Basis of claim: Used in
Rate forwarded to RCs of Customs: New York & Boston (Baltimore Liquidation), August 3, 1989

(K) Company: E. I. du Pont de Nemours & Co., Inc.
Articles: X-ray film in wide or slit rolls and in sheets
Merchandise: Nonsensitized polyethylene terephthalate film base material (P–96)
Factories: Parlin, NJ; Brevard, NC; Rochester, NY
Statement signed: November 29, 1988
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York & Boston (Baltimore Liquidation), August 1, 1989

(L) Company: Eastman Kodak Co.
Articles: Acetoacet-o-anisidine (AAOA)
Merchandise: o-anisidine liquid form
Factory: Kingsport, TN
Statement signed: January 25, 1989
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Boston (Baltimore Liquidation), June 2, 1989

(M) Company: The Goodyear Tire & Rubber Co.
Articles: Tires
Merchandise: SPONBAX, NOBAX, PHENAX, PONTAX, OLIVAX, TUAX, VULTAX, CODE–72 (PIG 72)
Factories: Akron, OH; Cartersville & Calhoun, GA; Danville, VA; Gadsden, Scottsboro & Decatur, AL; Lawton, OK; Topeka, KS; Union City, TN; Houston, Beaumont & Bayport, TX; Niagara Falls, NY; Pt. Pleasant, WV
Statement signed: February 2, 1989
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, June 26, 1989

(N) Company: Hoechst Celanese Chemical Group, Inc.
Articles: Butyl acetate; butyl acrylate; formcel normal butanol solution
Merchandise: Butanol
Factories: Bay City, Bishop, Houston & Pampa, TX; Newark, NJ; Cumberland, MD; Narrows, VA; Rock Hill, SC
Statement signed: January 30, 1989
Basis of claim: Used in
Rate forwarded to RC of Customs: New York & Houston, July 11, 1989

(O) Company: Indian River Foods, Inc.
Articles: Grapefruit juice from concentrate (reconstituted juice); frozen concentrated grapefruit juice; bulk concentrated grapefruit juice
Merchandise: Concentrated grapefruit juice for manufacturing
Factory: Fort Pierce, FL
Statement signed: December 27, 1988
Basis of claim: Used in
Rate forwarded to RC of Customs: Miami, July 17, 1989

(P) Company: M & T Chemicals Inc.
Articles: Polyvinyl stabilizers (thermolites)
Merchandise: Iso-octyl mercapto acetate (IOMA)
Factory: Carrollton, KY
Statement signed: November 22, 1988
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, June 22, 1989
Revokes: T.Ds. 77–29–Q and 77–102–Q

(Q) Company: Monsanto Co.
Articles: Various chemicals and agricultural products
Merchandise: 2,6-diethylaniline; monochlorobenzene; methanol
Factories: Muscatine, IA; St. Louis, MO
Statement signed: November 10, 1988
Basis of claim: Appearing in
Rate forwarded to RCs of Customs: New York & Chicago, May 24, 1989
Revokes: T.D. 78–258–U

(R) Company: Morton Thiokol, Inc., Ventron Div.
Articles: Plastic stabilizers
Merchandise: Thioglycolic acid
Factory: Cincinnati, OH
Statement signed: December 13, 1988
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, June 26, 1989
Revokes: T.D. 87–99–S

(S) Company: IRECO, Inc.
Articles: Cluster bombs; practice munitions
Merchandise: Composition B, Type I, Grade A per MIL–C–401E, body dummy
Factory: Pelican Point, UT
Statement signed: December 16, 1987
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Chicago, April 28, 1989
Revokes: T.D. 85–165–O

(T) Company: PMC, Inc., PMC Specialties Group
Articles: Dyphene 8318
Merchandise: Phenol
Factory: Fords, NJ
Statement signed: September 7, 1988
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Chicago, May 31, 1989

(U) Company: Polaroid Corp.
Articles: Film packets
Merchandise: Fuji chrome 64 professional T–RTP film; Fuji chrome 100 professional D–RDP film
Factory: Waltham, MA
Statement signed: December 15, 1988
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, June 26, 1989

(V) Company: R & D Services, Inc., d/b/a Continental Flavors & Fragrances de Puerto Rico
Articles: Food and beverage flavor bases
Merchandise: Concentrated peach puree
Factory: Arecibo, PR
Statement signed: December 11, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: Los Angeles, June 27, 1989

(W) Company: Richardson Polymer Corp.
Articles: Copolymer and terpolymer products including CTE, P-210D, NAS®, RSA®-3G, R-570®, Zylar
Merchandise: Liquid styrene monomer
Factory: West Haven, CT
Statement signed: June 20, 1988
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, May 15, 1989
Revokes: Unpublished authorization letter of September 19, 1988

(X) Company: SmithKline Beckman Animal Health Products, Division of SmithKline Beckman Corp.
Articles: Virginiamycin a/k/a stafac in various potencies
Merchandise: Virginiamycin a/k/a Stafac™ 500
Factory: Omaha, NB
Statement signed: March 14, 1989
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Boston (Baltimore Liquidation), June 29, 1989

(Y) Company: Solidur Plastics Co.
Articles: Skived polyethylene sheets
Merchandise: Ultra high molecular weight polyethylene sheets
Factory: Pittsburgh, PA
Statement signed: October 26, 1988
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, April 27, 1989

(Z) Company: World Carpet, Inc.
Articles: Tufted carpet; carpet yarn
Merchandise: Nylon and polyester staple fiber; nylon and polyester filament yarn
Factories: Cartersville, Columbus, Rome, Chatsworth & Dalton, GA
Statement signed: March 13, 1989
Basis of claim: Used in
Rate forwarded to RC of Customs: Miami, May 26, 1989

APPROVALS UNDER T.D. 84–49

(1) Company: Chevron U.S.A. Inc.
Articles: Petroleum products and petrochemicals
Merchandise: Crude petroleum and crude petroleum derivatives
Refineries: Various as listed in statement
Statement signed: October 7, 1988
Basis of claim: As provided in T.D. 84–49
Rate forwarded to RCs of Customs: Houston & Los Angeles (San Francisco Liquidation), April 27, 1989
Revokes: T.D. 89–23–2

(2) Company: Fina Oil and Chemical Co.
Articles: Various petroleum products
Merchandise: Crude petroleum and derivatives
Refineries: Port Arthur & Big Spring, TX
Statement signed: January 24, 1989
Basis of claim: As provided in T.D. 84–49
Rate forwarded to RCs of Customs: Houston & New York, April 26, 1989

(3) Company: Tesora Alaska Petroleum Co.
Articles: Petroleum and petrochemical products
Merchandise: Crude petroleum and petroleum derivatives
Refinery: Kenai, AK
Statement signed: March 31, 1989
Basis of claim: As provided in T.D. 84–49
Rate forwarded to RC of Customs: Houston, May 3, 1989

(T.D. 89–90)

EXTENSION OF ANALYSES FOR WHICH COMMODITY CONTROL SERVICES, INC., AN ACCREDITED CUSTOMS LABORATORY, HAVE BEEN ACCREDITED TO PERFORM

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of additional analysis for which Commodity Control Services, Inc., a Customs accredited commercial laboratory, have been accredited to perform.

SUMMARY: Commodity Control Services Inc., of Clark, New Jersey, a Customs accredited commercial laboratory under § 151.13 of the Customs Regulations (19 CFR 151.13), has been given an extension of their commercial laboratory accreditation to include the following analyses: Reid Vapor Pressure, Saybolt universal viscosity, percent by weight sulfur of petroleum products, and percent by weight lead in gasoline.

SUPPLEMENTARY INFORMATION:

Part 151 of the Customs Regulations provides for the acceptance at Customs Districts of laboratory analyses from Customs-accredited commercial laboratories for certain products. Commodity Control Services Corp., which holds Customs accreditation in certain laboratory analyses has applied to Customs to extend its accreditation to the performance of additional analyses. Review of Commodity Control Corp.'s qualifications shows that the extension is warranted and, accordingly, has been granted.

EFFECTIVE DATE: September 30, 1989.

FOR FURTHER INFORMATION CONTACT: Donald A. Cousins, Office of Laboratories and Scientific Services, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229 (202-566-2446).

Dated: September 26, 1989.

JOHN B. O'LOUGHLIN,
Director,
Office of Laboratories and Scientific Services.

[Published in the Federal Register, October 2, 1989 (54 FR 40564)]

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., September 20, 1989.

The following are abstracts of unpublished rulings recently issued by the U.S. Customs Service. The abstracts are set forth to provide interested parties with general information regarding the types of issues currently being addressed by the U.S. Customs Service. By their inclusion herein, the rulings abstracted shall not be considered "published in the Customs Bulletin," within the meaning of section 177.10 of the Customs Regulations (19 CFR 177.10), nor do such abstracts establish a uniform practice.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

(C.S.D. 89-93)

Abstracts of Unpublished Customs Service Decisions

COMMODITY CLASSIFICATION

C.S.D. 89-93(1)—*Commodity:* Boot. A woman's boot (snow jogger) has one color molded rubber/plastic sole and a polyurethane upper with vinyl overlays. There is a gap between the bottom of the plastic upper and the top of the outer sole. The sidewall of the cup sole overlaps the plastic upper of all around the boot. *Classification:* The woman's snow jogger is classifiable under subheading 6402.91.4045, HTSUSA. *Document:* HQ 083798, dated April 11, 1989.

C.S.D. 89-93(2)—*Commodity:* Boots. A pair of men's high gloss military type boots measuring 10½ inches high, with a leather gusset tongue and a ten hole metal ring lace closure. The sole of the boot is rubber and is attached by vulcanization. A description indicates that the leather upper has a permair finish on split leather, a process whereby a .3 mm-thick film of polyurethane foil is laminated onto a base material of leather. The effect of this process is to create a lustrous mirror-like appearance resembling

patent leather. *Classification:* The military type boots are classifiable under subheading 6403.91.60, HTSUSA, which provides for footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather, other footwear, covering the ankle, other, for men, youths and boys. *Document:* HQ 082143, dated March 21, 1989.

C.S.D. 89–93(3)—*Commodity:* Coffee filter and coffee filter paper. Samples are called "Disc," "Wrap," "Basket," and "Cone," The Disc, Wrap and Basket are filter paper cut to shape or size. The Cone filters, which evidently are made in five sizes, are non-rectangular shapes which have been crimp-sealed along two edges of the fold. *Classification:* The Disc, Wrap and Basket coffee filter papers are classified in subheading 4823.20.90, HTSUSA. The Cone coffee filter is classified in subheading 4823.90.85, HTSUSA. *Document:* HQ 083696, dated May 30, 1989.

C.S.D. 89–93(4)—*Commodity:* Coriander. Fresh coriander from Mexico. *Classification:* Fresh coriander is classifiable as a vegetable in subheading 0709.90.4080, HTSUSA. *Document:* HQ 084042, dated May 31, 1989.

C.S.D. 89–93(5)—*Commodity:* Costume cape. The article is a 41-inch black nylon costume cape. The cape is for the use of children and adults, primarily for costume purposes during Halloween. *Classification:* The costume cape is classifiable under the provision for overcoats, carcoats, capes, cloaks, and similar articles, of manmade fibers, other,* * * in subheading 6202.13.4020, HTSUSA, textile category 635. *Document:* HQ 083827, dated May 30, 1989.

C.S.D. 89–93(6)—*Commodity:* Drink mix. The product is a drink base mix that contains sugar, citric acid, tricalcium phosphate, vitamin C, sodium citrate, lemon flavor, and FD&C yellow #5. The drink mix base is to be used in the beverage industry as a base for the production of a variety of flavors of dry drink mixes. The finished drink mixes are produced by adding additional flavorings and colorings. The final product is produced by the addition of water by the consumer. *Classification:* The drink mix is classifiable under subheading 1701.91.40, HTSUSA, and subject to zero quota restrictions of 9904.50.40, HTSUSA, which provides for articles containing over 65 percent by dry weight of sugars derived from sugar cane or sugar beets, whether or not mixed with other ingredients, capable of being further processed or mixed with similar or other ingredients, and not prepared for marketing to the retail consumer in the identical form and package in which imported; all the foregoing articles provided for in subheading 1701.91.40, HTSUSA, which provides for cane or beet sugar, containing added flavoring matter whether or not containing added coloring. NYRL 825891 and all other rulings which are

inconsistant with the instant ruling ar accordingly modified. *Document:* HQ 083698, dated June 1, 1989.

C.S.D. 89–93(7)—*Commodity:* Figure. The article represents an "Old World Santa." It has a ceramic face, beard, hands and lower trunk. The figure is wearing a full length red textile coat with beige trim around the collar, hemline, front and sleeves and is holding a green colored textile bag containing simulated articles relating to the Christmas season. *Classification:* The santa figure is classifiable under subheading 9502.10.4000, HTSUSA, which provides for dolls representing only human beings, whether or not dressed, other than stuffed, not over 33 cm in height. *Document:* HQ 083816, dated May 30, 1989.

C.S.D. 89–93(8)—*Commodity:* Flower pots and hanging baskets. The articles are grower pots and hanging baskets both of polyethylene and polypropylene. The grower pots are disposable after the shrub is planted, the hanging baskets may be used as permanent containers. The baskets are plastic containers with drainage trays and galvanized steel hanging wires formed at the end into a hook. A steel sleeve coated with zinc is slipped over the hook portion to provide strength and resistance to corrosion. *Classification:* The grower pots and wire hanging baskets are classifiable in subheading 3926.90.9050, HTSUSA. *Document:* HQ 083829, dated May 31, 1989.

C.S.D. 89–93(9)—*Commodity:* Footwear parts. The articles include a boot liner, a sandal upper, moccasin uppers and a man's cold weather boot upper. *Classification:* The boot liner is classifiable under subheading 6406.10.7560, HTSUSA, textile category 369. The sandal top is classifiable under subheading 6406.10.1000, HTSUSA. The moccasin uppers are classifiable under subheading 6406.10.0500, HTSUSA, if the finished footwear will be worn by males. Otherwise, these uppers are classifiable under subheading 6406.10.1000, HTSUSA. The fabric/leather shaft is classifiable under subheading 6406.10.8040, HTSUSA, textile category 669. *Document:* HQ 083926, dated May 26, 1989.

C.S.C. 89–93(10) *Commodity:* Insoles. The removable insole consists of a synthetic fleece top layer which is sewn to a thin fabric backing. Below the fabric backing is a latex foam. Under the latex is a thin sheet of aluminum foil which serves to keep ground cold out. *Classification:* The insole is classifiable under subheading 6406.99.9000, HTSUSA, which provides for parts of footwear: removable insoles, other, of other materials, other. *Document:* HQ 083832, dated May 31, 1989.

C.S.C. 89–93(11) *Commodity:* Jacket. The article is a man's reversible hip-length hooded jacket with one woven shell (side A) of 65 percent polyester, 35 percent cotton, and the other woven shell

(side B) wholly nylon with a nonwoven batting stitched to it in a pattern of 4-inch squares. The nylon fabric is stated to be coated with a plastics material but that material cannot be seen with the naked eye. Side A has slant zippered pockets at the waist, covered pockets in the chest area, velcro sleeve tabs, epaulets, a zippered pocket on the left sleeve, and a covered front zipper. Side B has double entry waist pockets and slant pockets in the chest area. The garmet was tested for water resistence. *Classification:* The jacket is classifiable under the provision for other men's or boys' anoraks, windbreakers, or similar articles, of man-made fibers, in subheading 6201.93.3510, HTSUSA, textile category 634. *Document:* HQ 083792, dated April 10, 1989.

C.S.C. 89–93(12) *Commodity:* Pajama set. The set is a woman's 100 percent cotton knit top and shorts set. The top is a short sleeved loose fitting pullover with a rib knit crew neck, one breast pocket, and a hemmed bottom. The shorts are also loose fitting with an elasticized waist, open fly front, and hemmed bottoms. Both components are of the same fabric construction, color, style, and composition and are of corresponding size. *Classification:* The top and shorts set is classifiable as a pajama set in subheading 6108.31.0010, HTSUSA, textile category 351. NYRL 836110 is revoked in full. *Document:* HQ 083724, dated May 31, 1989.

C.S.C. 89–93(13) *Commodity:* Pajamas and handkerchief. Three pieces all of 100 percent woven polyester. The top is waist length, with short sleeves; thin, covered shoulder pads; a single patch pocket on the left side; a deep V neckline with two buttons at the waist; and a two-inch slit at the lower edge on either side. A ten-inch-square handkerchief in a contrasting color is pinned to the pocket. The pajama bottoms are styled like pull-on shorts, with side seams slit to the waist. Indications are that the pajamas and handkerchief are imported and sold together. *Classification:* The pajamas and handkerchief are classified under subheading 6208.22.0000, HTSUSA, textile category 651. The handkerchief is classifiable under subheading 6213.90.1000, HTSUSA, textile category 630. *Document:* HQ 083506, dated April 3, 1989.

C.S.D. 89–93(14)—*Commodity:* Pants, belt and suspenders. A pair of women's capri pants of woven 100 percent cotton fabric, extending to just below the knee, features a front opening with three buttons and a zipper, two pockets in the front, and two patch pockets in the back. Eight self-fabric loops carry a 100 percent cotton woven belt with a metal D-ring closure. A pair of woven man-made fiber elastic clip-on suspenders is included. *Classification:* The pants, belt, and suspenders are classified as a set consisting of composite goods and a pair of suspenders under subheading 6204.62.4020, HTSUSA, a provision for women's blue denim trousers and breeches. The textile category for the trou-

sers and belt is 348. The textile category for the suspenders, from subheading 6212.90.0030, HTSUSA, is 659. *Document:* HQ 083504, dated April 3, 1989.

C.S.D. 89–93(15)—*Commodity:* Polypropylene tubular fabric. The fabric is described as plain woven tubular form. It is woven with polypropylene strips on a circular loom. The filling yarns are composed of continuous strip which is interlaced in a circular motion producing a seamless tube. The fabric is to be used in making sand bags and bulk bags. *Classification:* The fabric is classifiable under the provision for woven fabrics obtained from strip or the like, in subheading 5407.20.0000, HTSUSA, textile category 620. *Document:* HQ 083933, dated May 31, 1989.

C.S.D. 89–93(16)—*Commodity:* Syrup. Orange flavored syrup containing the following ingredients on a dry weight basis: 49 percent sugar, 49 percent corn syrup and the balance five fold natural orange oil. The syrup should be used in its condition as imported in the manufacture of hard candies. *Classification:* The syrup is classifiable under subheading 2106.90.50, HTSUSA, as other food preparations not elsewhere specified or included, and subject to absolute quota restrictions of subheading 9904.50.20, HTSUSA. *Document:* HQ 083578, dated May 31, 1989.

C.S.D. 89–93(17)—*Commodity:* Tree crosses and tree moving baskets of wire. The tree crosses are wire articles used primarily by nurserymen to contain and protect the root systems of shrubs and small trees during transport. The moving baskets are also made of wire and are used to protect the root systems of larger shrubs and trees during transport. *Classification:* Tree crosses and tree moving baskets, of wire, are classifiable in subheading 7326.20.0050, HTSUSA, or in subheading 7326.90.9090, HTSUSA, as appropriate. *Document:* HQ 083969, dated May 26, 1989.

C.S.D. 89–93(18)—*Commodity:* Triglycerides. Gamma-Linolenic acid oil (triglycerides) is derived from a microorganism (Mortierella Isabellina, a fungus) by a fermentation process. In a Customs laboratory report, a sample was said to be composed of fatty triglycerides of which a certain percentage of the derivable fatty acids is gamma linolenic acid. Technical sources consulted were said to reveal that the material was derived from hydrocarbons by fermentation using Mortierella Isabellina fungus. The material was said to be used in human nutritional products. *Classification:* Mixtures of fatty triglycerides are classifiable in subheading 3823.90.5050, HTSUSA. *Document:* HQ 084421, dated May 31, 1989.

C.S.D. 89–93(19)—*Commodity:* Trinket box. The article is a hexagonal box having sides of equal dimensions and measuring approximately 2½ inches in height by 5¼ inches in diameter from point

to point. The box consists of separate upper and lower sections which fit together to form a closed container. Both sections are constructed of layered paper and paperboard. The exterior surfaces have been covered with white cotton fabric. The interior surfaces are lined with gold-colored paper. The inside of the lid of the box has a sponge-like sheet of expanded plastic foam which creates a slightly dome-like appearance. *Classification:* The general purpose box is classified under subheading 4823.90.8500, HTSUSA, which provides for other paper, paperboard, other articles of paper pulp, paper, paperboard, other, other. *Document:* HQ 082444, dated May 31, 1989.

C.S.D. 89–93(20)—*Commodity:* Yarn. The yarn is designed for use as a packing or sealant material and is composed of 52 percent copper thread, 33 percent glass filament, 9 percent acrylic staple fibers and 6 percent viscose staple fibers by weight. *Classification:* The yarn is classified under subheading 5911.90.0000, HTSUSA, covering other textile products and articles for technical uses specified in Note 7 to Chapter 59. *Document:* HQ 083830, dated May 31, 1989.

U.S. Customs Service

Proposed Rulemaking

19 CFR Parts 132, 142

RIN #1515–AA76

WITHDRAWAL OF PROPOSED CUSTOMS REGULATIONS AMENDMENTS REGARDING QUOTA QUANTITY ENTRY LIMITS AND THE FILLING OF ABSOLUTE QUOTAS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rules; withdrawal.

SUMMARY: This document withdraws two proposals to amend the Customs Regulations regarding quota class merchandise. One proposed rule concerned the quantity of such merchandise that could be entered at the opening of a quota. It was intended to correct a situation whereby some importers have attempted to receive a quantity of quota class merchandise in excess of their pro rata share by filing multiple entries for a quantity in excess of the known restraint level. The other proposed rule was to provide that importers may not transfer allotments from one port of entry to another for absolute quotas that fill at opening. Both proposed rules were intended to overcome very labor intensive procedures Customs had implemented to assure that importers received only their pro rata share of quota class merchandise.

Another consideration of the comments received in response to the proposed rules and in light of advances in the automated quota system capabilities and projected additional advances therein, as well as increased voluntary use of the Automated Broker Interface (ABI), it is anticipated that Customs will be able to utilize the automated system capabilities to establish the appropriate controls in the subject situations.

DATE: Withdrawal effective October 4, 1989.

FOR FURTHER INFORMATION CONTACT: Karen Cooper, Quota Branch, Regulatory Trade Programs Division, (202)–566–8592.

SUPPLEMENTARY INFORMATION:

Background

On January 19, 1988, Customs published a notice in the Federal Register (53 FR 1376), proposing to amend Sections 132.4, 132.13 and 142.21, Customs Regulations (19 CFR 132.4, 132.13 and 142.21), to provide that when an importer files entries or withdrawals for consumption for quantities for quota-class merchandise in excess of the admissible quantity, those entries and withdrawal would be rejected and returned to the importer. The purpose of the proposed rule was to relieve Customs quota control personnel from a considerable workload involved in matching quota quantities and importers to assure that any particular importer would not be allocated a quantity in excess of its pro rata share.

On February 23, 1989, Customs published a notice in the Federal Register (54 FR 7781), proposing to amend Section 132.12, Customs Regulations (19 CFR 132.12) to provide that an importer could combine merchandise from one entry summary for consumption or withdrawal for consumption with others within the same port to fill his quota allotment, but he could not transfer an allotment of quota from one port of entry to another. The purpose of this proposal was to permit use of the Customs Automated Commercial System (ACS) in calculating quota closings and prorations.

Discussion

Six comments were received in response to the first noted proposed rule. They noted there was difficulty in knowing the exact quota quantity available and that rejection of the entries for what may be an inadvertence or clerical error was rather severe.

Two comments were received in response to the latter proposed rule. They noted that the proposal would increase costs, add delays to an otherwise costly and time consuming process, and would generally be anti-facilitative. The commenters also wondered whether the Automated Commercial System (ACS) could be designed to allow for the transfer of allotments.

Although some of the difficulties noted by the commenters have been corrected, upon reviewing the above comments and noting advances in automation, the increase in voluntary participation in the Automated Broker Interface (ABI) portion of ACS, and projected additional advances in the automated quota system capabilities, Customs has concluded that procedures contained in the proposed rules would not be necessary. Customs agrees with the commenters that the ACS system could be designed to assure that only available quota quantities are prorated and to track the transfer of allocated quota quantities between ports. The use of the ACS capabilities would relieve Customs from labor intensive procedures without placing additional burdens on the importing public.

CONCLUSION

In accordance with the above discussion, Customs now believes that the procedures proposed are no longer necessary and should not be implemented. Accordingly, the proposed rule to amend Sections 132.4, 132.13 and 142.21, Customs Regulations (19 CFR 132.4, 132.12, and 142.4) and the proposed rule to amend Section 132.12, Customs Regulations (19 CFR 132.12) are being withdrawn.

DRAFTING INFORMATION

The principal author of this document was Arnold L. Sarasky, Regulations and Disclosure Law Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

MICHAEL SCHMITZ,
Acting Commissioner of Customs.

Approved: September 27, 1989.
SALVATORE R. MARTOCHE,
Assistant Secretary of the Treasury.

[Published in the Federal Register, October 4, 1989 (54 FR 40887)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 89-127)

AOC INTERNATIONAL, INC., FULET ELECTRONIC INDUSTRIAL CO., LTD., SAMPO CORP., AND TATUNG CO., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, ZENITH ELECTRONICS CORP., DEFENDANT-INTERVENOR

Court No. 87-01-00122

[Plaintiffs' motion granted in part, denied in part; action remanded.]

(Decided September 11, 1989)

Willkie Farr & Gallagher (*Christopher Dunn, William J. Clinton, Zygmunt Jablonski* and *William B. Lindsey*) for the plaintiffs.

Stuart E. Schiffer, Acting Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Jeanne E. Davidson*) Department of Commerce (*Leila J. Afzal*) for the defendant.

Frederick L. Ikenson, P.C. (*J. Eric Nissley*) for defendant-intervenor, Zenith Electronics Corporation.

WATSON, *Judge:* In this action, plaintiffs AOC International ("AOC"), Fulet Electronic Industrial Co. ("Fulet"), Sampo Corporation ("Sampo") and Tatung Company ("Tatung") challenge the final results of the first administrative review of the Department of Commerce, International Trade Administration ("ITA" or "Commerce") covering importations of color television receivers ("CTVs"), except for video monitors, from Taiwan which are subject to an antidumping duty order. *See* 51 Fed. Reg. 46895 (December 29, 1986).

Plaintiffs are the manufacturers and exporters of the CTVs to the United States and respondents in the administrative proceeding below. As such, plaintiffs have the standing to bring this action under 19 U.S.C. § 1516. Zenith Electronics Corporation, a defendant-intervenor, is a domestic manufacturer of the subject merchandise, and has also participated in the administrative review below as petitioner.

The Court has jurisdiction to review the final results of the administrative review under 28 U.S.C. § 1581(c).

CALCULATIONS OF WARRANTY EXPENSES

Plaintiffs challenge the ITA's methodology of calculating the circumstance-of-sales adjustment for the differences in warranty expenses between the United States and home markets. The ITA

made a determination that plaintiffs qualified for this adjustment pursuant to the applicable law. In calculating the adjustment, however, the ITA included the cost of labor incurred in servicing warranties through an outside contractor in the U.S. market, while excluding the cost of labor incurred in servicing warranties by the in-house servicemen in the home market. Thus, the total amount of warranty expenses in the home market was limited to the spare part costs of servicing the warranty repairs during the review period. The ITA explained that the in-house labor costs are "fixed", rather than "variable", costs which, by definition, do not qualify as "directly-related" selling expense.

As a result of the ITA's calculations, the amount of warranty expenses in the U.S. market greatly exceeded those in the home market, even though plaintiffs offered longer warranty terms in the home market. This adjustment resulted in a corresponding increase of dumping margins.

Plaintiffs allege that the distinction made by the ITA in treating warranty-labor costs incurred by the outside servicing company in the United States as directly-related selling expenses, while treating the in-house labor costs in the home market as indirect selling expenses is arbitrary, and that it leads to absurd results. Plaintiffs argue that an overall eligibility of warranty expenses as directly-related selling expense under the applicable law extends to all warranty-related costs including the in-house labor costs in the home market.

Defendant argues that each element of an adjustment for the differences in warranty expenses must independently qualify as a directly-related selling expense in order to be included in the calculations of the adjustment, and that the overall eligibility of warranty expenses for an adjustment as directly-related selling expense does not *per se* qualify every component of warranty expenses to be included in the calculations.

Defendant refers to the established administrative practice as restated in the *Study of Antidumping Adjustments Methodology and Recommendations for Statutory Change* (U.S. Department of Commerce, 1985 "*Adjustment Study*"), page 46:

> Direct expenses incurred include travel expenses of a servicemen going to and from the location of the servicing, hotel expenses incurred in travel to perform servicing, and payments to unrelated firms for performing servicing. Indirect warranty expenses include a servicemen's wages, depreciation on a service truck, and welfare, bonuses, retirement, depreciation, utilities, rent, and other G & A [general and administrative expenses] incurred by the service department.[1]

[1]Defendant's Brief at 23 (emphasis omitted) (This study was prepared by the Department of Commerce and submitted to Congress pursuant to § 624 of the Trade and Tariff Act of 1984, Pub. L. 98–573, 98 State. 3024).

Defendant also refers to the ITA's explanation of the difference in treatment between "fixed" and "variable" expenses in *Industrial Phosphoric Acid from Israel,* 52 Fed. Reg. 25440 (July 7, 1987), which states:

> We consider these fixed costs to be general overhead expenses which the company incurs regardless of whether a particular sale is made. We deducted only the variable costs incurred at [the facility] which qualify as direct selling expenses because these costs are directly related to specific sales.[2]

Defendant argues that in-house labor costs are "fixed" costs which are incurred regardless of whether a particular sale is made and which, therefore, do not bear a direct relationship to the sales under consideration.

The Court does not accept the ITA's rationale that the in-house labor costs, which are incurred in servicing of warranty repairs, are fixed overhead costs which a company incurs irrespective of the terms of the sales under consideration. It would be contrary to common sense to maintain a warranty servicing department and to pay salaries to the in-house servicemen, if no warranty terms were offered on the CTV sales. Similarly, a much smaller servicing department would be necessary to service warranties with more limited terms. The mere fact that in-house servicemen receive "fixed" salaries does not mean that the warranty-labor cost of the company is a fixed overhead expense which a company must incur irrespective of the terms of the sales under consideration. A per sale allocation of warranty-labor costs would vary depending on the terms offered with regard to each sale.[3]

The statutory purpose of the circumstance-of-sales adjustments is to allow for a fair "apple-to-apple" comparison of sales in the two markets "at the specific 'common' point in the chain of commerce" when the merchandise is leaving the "factory gates". *Smith-Corona Group, SCM Corp.* v. *U.S.,* 713 F. 2d 1568, 1572 (CAFC, 1983), *cert. denied,* 465 U.S. 1022 (1984).

The circumstance-of-sales adjustments are intended to negate the distortive impact of the diverse commercial forces in the two different markets. Instead of negating this distortion, the ITA's differentiation in treatment of warranty-labor in the two markets clearly aggravates these distortions. The absurd result of the ITA's differentiation between the labor costs incurred through an outside servicing company in the United States and the in-house labor costs of the same nature is obvious. The ITA's calculations were bound to distort the price comparisons by including in the calculations the high labor-servicing costs in the U.S. market, without giving any credit for the labor costs which were incurred in the home market.

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[2]Id, emphasis added.

[3]Distinguish the facts of this case from those in *Rhone Poulenc, S.A.* v. *U.S.*, 8 CIT 47, 592 F. Supp. 1318 (1984), and *LMI-La Metalli Industriale, S.P.A.* v. *U.S.*, Slip Op. 89–46 (April 11, 1989), where in-house labor costs could not be attributed exclusively to the difference in the circumstances of sales for which adjustment was claimed or to the products under consideration.

Similarly, the Court finds that the logic of defendant's reasoning that each individual component of a directly-related selling expense must independently qualify as a directly related selling expense is convoluted. First of all, the Court finds no such requirement in the statute or the administrative regulations. According to 19 C.F.R. § 353.15a:

> In comparing the United States price with the sales, or other criteria applicable, on which a determination of foreign market value is to be based, reasonable allowance will be made for *bona fide* differences in the circumstance of sales compared. Differences in circumstances of sale for which such allowances will be made are limited, in general, to those circumstances which bear a direct relationship to the sales which are under consideration.

The ITA does not dispute that plaintiffs met the requirement of this provision and established to its satisfaction that the *bona fide* differences in warranty expenses existed between the two markets. In fact, the ITA did make a determination to make an adjustment for the differences in warranty expenses.

The restrictive language of the regulations which requires "a direct relationship to the sales" refers to the *bona fide* differences in warranty expenses for which "a reasonable allowance will be made". There is no further requirement that each cost component of the directly-related selling expense must independently qualify as a directly-related selling expense in order to be included in the calculation of an adjustment.

It is difficult to follow the logic of the ITA's decision to grant an adjustment for the difference in warranty expenses, while disallowing a major cost component of this directly-related selling expense.

The ITA's failure to consider costs of warranty-labor in the home market as a reasonable measurement of the allowance is also contrary to 19 C.F.R. § 353.15(d), which states specifically that "[i]n determining the amount of the reasonable allowances for any differences in circumstances of sale, the Secretary will be guided primarily by the cost of such differences to the seller."

In view of these regulations, the Court does not need to hold that the eligibility of warranty expenses as directly-related selling expense *per se* qualifies the labor cost component of the warranty expenses as directly-related selling expense. The Court does find, however, that a cost component of a directly-related expense is not a separate selling expense which must independently meet the "direct relationship" test under the regulations, but is a proper measurement of the directly-related warranty expense. In *Smith-Corona, infra,* at p. 1577, the Court of Appeals authorized the use of costs as an acceptable basis for the circumstance-of-sale adjustments and stated that "absent evidence that costs do not reflect value, the Secretary may reasonably conclude that costs and value are directly related."

Finally, the ITA's own *Adjustment Study,* at 39, provides that no actual relationship to the specific sales under consideration is required in making adjustments for the differences in warranty expenses:

> Examples of costs for which a circumstance-of-sale adjustment might be allowed are credit, advertising, technical services, special testing, commissions, and warranty costs. Normally, * * * such costs must be directly related to the sales under consideration. For some expenses, however, we may use costs incurred during a particular period as the best information available for expenses associated with the sales under consideration. For example, we have used warranty costs incurred during the period of investigation or historical warranty data incurred over a longer period as best information for warranty costs associated with sales made during the period of investigation, since the latter would not be known until long after the period of investigation.

Defendant's allegation that "Commerce has consistently required that warranty costs be directly linked to sales of the merchandise under consideration" is, therefore, misleading.[4] The *Adjustment Study* indicates that the total costs of servicing warranties during a particular historical period are an acceptable measurement of the adjustment without any additional requirement to trace the relationships between these expenses and the specific sales under review.

The circumstance-of-sales adjustment for the differences in warranty expenses is rendered meaningless by the ITA's failure to include a major costs component of this expense in the home market. The Court concludes that in doing so, the ITA violated the requirement to make reasonable allowances for the *bona fide* differences in warranty expenses between the U.S. and home markets. The Court remands this determination to the ITA for reconsideration in accordance with this opinion.

Bad Debt Expenses

Sampo challenges the ITA's denial of a circumstance-of-sales adjustment for the differences in bad debt losses between the U.S. and home markets. Sampo substantiated its claim for this adjustment by tracing bad debt losses, which were incurred during the review period, to the individual bankrupt dealers and specific products.

The ITA rejected this claim for an adjustment on the ground that the bad debt losses were incurred in relation to prior sales and that, therefore, these losses were not directly related to the sales under the review.

The administrative practice of the ITA with regard to bad debt losses is explained in the notice of the final results of this review as follows:

[4] Defendant's Brief at 23.

> Bad debt is by its nature an indirect selling expense since, under generally accepted accounting principles, bad debt is recovered over time by future price increases.

51 Fed. Reg. at 46899.

Defendant further explains this position by stating that "[b]ad debt losses are not direct selling expenses related to a particular sale unless and until they are written off. Until that time, the bad debt is merely an account receivable, and not an expense incurred with respect to a particular sale, because the debt could still be collected."[5]

Plaintiff disputes the ITA's characterization of the bad debt loss as "by its nature an indirect selling expense". In particular, plaintiff argues that these expenses should properly be treated as direct selling expenses, because an accurate interpretation of the generally accepted accounting principles, relied upon by the ITA, recognizes a direct impact of bad debt losses on prices. In addition, Sampo argues that bad debt losses should be treated exactly like warranty expenses, which are considered as directly-related expenses by the ITA, even though warranty expenses incurred during a review period also relate to prior sales.

In *Daewoo* v. *U.S.*, No 89–42, at 10 (CIT 1989), the court has addressed and accepted the analogy between warranty and bad debt expenses, stating that:

> The actual amount of both expenses are not usually known at the time of sales, because these types of expenses by their very nature are incurred sometime in the future when, and if, the merchandise malfunctions, or when a purchaser defaults.

The Court once again finds a vicious circle in the ITA's reasoning which "implies that an adjustment for bad debt can almost never be granted, because by the time [plaintiff] attempts to collect the debt, the period of review with regard to which the debt has been incurred, and could be considered a direct selling expense, would ordinarily have expired." *Id.*

The facts presented by this case demonstrate with an added clarity the impossible criteria imposed by the ITA in order to qualify for an adjustment for bad debt losses. Sampo did attempt to submit an alternative bad debt claim with regard to the specific sales under review which became uncollectible while the administrative review was still in progress. This alternative submission was not honored by the ITA, because it was considered untimely when made after the preliminary results of the review.

Defendant-intervenor alleges that the bad debt expenses of the previous periods, unlike the warranty expenses, are not representative for the current period, because they depend on the fluctuating economic conditions of the market, rather than the merchandise under the review.

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[5]Defendant's Brief, at 18–19.

The Court finds that this argument of Zenith is relevant with regard to the method of calculating the expenses in question, rather than their substantive eligibility for an adjustment as directly-related selling expenses. The methods of calculating the adjustment for bad debt expenses is not now before the Court. The Court finds that the ITA's requirement that the bad debt expenses must be both incurred and written-off during the review period in order to qualify as directly-related selling expenses is not supported by the evidence on the record and is not in accordance with the applicable law.

The holding and reasoning in *Daewoo* is fully applicable and controlling in this case. The Court remands this issue to the ITA for reconsideration of an adjustment for the bad debt losses based on the company's bad debt experience during the period under review or another appropriate period.

ANTIDUMPING DUTY ASSESSMENT CAP

Plaintiffs challenge the ITA's interpretation of 19 U.S.C. § 1673f(a).[6] Plaintiffs assert that according to this statutory provision, the assessment of antidumping duties should be limited to the preliminary deposit rates of the initial investigation with regard to those entries which were made prior to the final injury determination of the International Trade Commission ("ITC"). The ITA argues that both the preliminary and final deposit rates are proper alternative limitations on the assessment of antidumping duties, notwithstanding the single statutory reference to the deposit rates established pursuant to the preliminary determination.

In *Daewoo, infra,* which was issued after commencement of this case, the court held:

> This reference to the authorization provision of Section 733(d) of the Act indicates that that provision granted Commerce a continuing authority to suspend liquidation and to collect estimated duty deposits.
>
> This provision indicates that the ITA has the authority to collect updated deposits in the amount at which foreign market value of the merchandise exceeds its U.S. price and to make a corresponding change in the deposit rates when the ITA perfects its calculations as a result of its final determination.
>
> The Court does not agree, therefore, that Section 737(a) of the Act limits the actual assessment of antidumping duty to the preliminary rates of estimated duty.[7]

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[6] 19 U.S.C. § 1673f(a)(1) provides:

> If the amount of a cash deposit collected as security for an estimated antidumping duty order under section 1673b(d) of this title is different from the amount of the antidumping duty determined under an antidumping duty order published under section 1673e of this title, then the difference for entries of merchandise entered, or withdrawn from warehouse, for consumption before notice of the affirmative determination of the Commission under section 1673b(d) of this title is published shall be—
>
> (1) disregarded, to the extent the cash deposit collected is lower than the duty under the order * * *

[7] *Id.* at 39 (footnote omitted).

Plaintiffs "recognize", but "respectfully disagree" with this court's reasoning in *Daewoo.*[8] Plaintiffs fail to present any new arguments, however, which would persuade the Court to depart from its prior decision.

Defendant-intervenor does not disagree with the outcome of the decision in *Daewoo,* but seems to favor an alternative reasoning for this outcome. Defendant-intervenor argues that the application of the assessment cap is limited to those cases where cash, as opposed to posting of a bond, is the form of the duty deposit.

The Court adheres to the reasoning fully elaborated in *Daewoo* and affirms the ITA's application of both preliminary and final deposit rates respectively in effect at the time of the entries of the merchandise as a maximum assessment rates for the entries which are made prior to the final injury determination of the ITC. The Court does not need to address the alternative reasoning advocated by Zenith, because the ITA's interpretations of this provision, regardless of the type of security deposit, was upheld by the court on a much broader basis.

Plaintiff Sampo raises a separate issue with regard to the antidumping duty assessment cap. Sampo alleges that the preliminary determination of the ITA established a dumping margin of 0.64 percent, which was published in the *Federal Register.*[9] The ITA modified this preliminary rate to 11.34 percent and instructed the U.S. Customs Service to apply this modified preliminary rate for security bonding purposes. The ITA never published an amended preliminary determination to reflect the modified rate of preliminary dumping margins. Sampo argues that pursuant to 19 U.S.C. § 1673b(f) and 19 C.F.R. § 353.39(a)(2), the unpublished revision of the preliminary dumping margins does not have any legal force and effect. Sampo asserts, therefore that the preliminary rate of 0.64 percent is the maximum assessment rate applicable to the subject entries under 19 U.S.C. § 1673f(a)(1).

Defendant concedes the validity of the publication requirement and submits that it will apply the published rate of 0.64 percent as an antidumping duty assessment cap for the applicable entries of Sampo's merchandise. Defendant-intervenor argues, however, that the actual notice of the modified deposit rate to Sampo is sufficient to apply the modified rate of 11.34 percent for the purposes of the assessment cap.

The Court upholds the ITA's position that the publication requirement is a legally binding condition for the antidumping duty assessment purposes pursuant to the express and unequivocal provision of the controlling statute.

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[8]Plaintiffs' Reply Brief at 39, footnote 23.

[9]*Color Television Receivers from Taiwan,* 48 Fed. Reg. 48490 (October 19, 1983).

ADDITIONAL ISSUES ON REMAND

The Court remands the final results to the ITA for reconsideration of the additional issues which are specifically conceded by defendant.

Defendant requests a remand for recalculation of FMV based on constructed value for Tatung's CTVs in the home market. Defendant does not address the specific arguments of Tatung challenging the ITA's methodology of calculating the constructed value. Instead, defendant concedes the lack of "adequate explanation" of its calculations in the record and requests a remand to "review and make corrections as necessary" and "to explain the calculation methodology."[10]

The Court's finding with regard to this issue is limited to a conclusion that the final results are not supported by substantial evidence on the record, because there is admittedly no record of the ITA's calculations with regard to this issue. The Court postpones addressing the specific arguments of Tatung, if necessary, until such time when the ITA submits the remand record with regard to this issue.

Similarly, defendant requested a remand to "recalculate AOC's inland freight and explain its calculation methodology."[11] The Court grants this request for a remand.

Defendant also requests a remand of the ITA's determination of FMV with regard to discounts and rebates which Tatung paid to distributors for trade-ins of used televisions by the dealers in the home market. Defendant-intervenor opposes a remand to adjust FMV for the discounts and rebates which are made in connection with the trade-ins. Defendant-intervenor argues that pursuant to the established administrative practice of the ITA, no such adjustment should be allowed.

Plaintiff distinguishes the facts of the administrative precedent in *Drycleaning Machinery from West Germany,* 50 Fed. Reg. 32154 (1985), which is relied upon by defendant-intervenor. Tatung argues that since the used machinery was actually sold by respondents in that case, the discounts offered for the traded-in drycleaning machinery were expected to be recouped and thus eliminated. In contrast, the used televisions in these cases were merely "disposed", and the standard discounts were offered by Tatung irrespective of the condition of the used televisions.

The Court recognizes the ITA's distinction between the price reduction as compensation for the traded-in merchandise, as opposed to discounts and rebates which are offered as a marketing tool to encourage new sales, irrespective of the value of the traded-in merchandise. The Court remands the final results to the ITA in order to adjust FMV, as appropriate.

[10]Defendant's Brief at 37–38.

[11]*Id.* at 38.

The ITA also concedes plaintiffs' argument that an adjustment for "advertising and sales promotion expenses should have been allocated on a product-line rather than model-specific basis."[12] The Court grants this request for a remand over an objection of defendant-intervenor that this request constitutes a *post hoc* change of policy which should not be allowed.[13] Defendant's admission that the methodology used by the ITA to calculate an adjustment for advertising expenses is not defensible on the record of this case shall not be precluded merely because the policy to change this methodology was adopted by the ITA after the completion of the review under consideration. The Court remands this issue to the ITA for reconsideration.

Finally, the ITA requests a remand to add the amount of commodity taxes forgiven upon exportation of CTVs to the United States, instead of subtracting this amount from FMV, as required by the statute and this court's decision in *Zenith Electronics Corp.* v. *U.S.,* 633 F. Supp. 1382 (CIT 1986) App. Doc. No. 88–1259 and 88–1260 (CAFC). The Court grants defendant's request for a remand with regard to this issue.

CONCLUSION

The Court remands the final results of the administrative review to the ITA for reconsideration in accordance with this opinion. The ITA is instructed to file the remand results within 90 days from the date of this decision.

(Slip Op. 89–128)

FIGURE FLATTERY, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83–10–01574

OPINION

[Plaintiff's motion for summary judgment denied; defendant's cross-motion for summary judgment granted.]

(Decided September 11, 1989)

Sharretts, Paley, Carter & Blauvelt, P.C. (*Gail T. Cumins* and *Ned H. Marshak*) for the plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice (*Saul Davis*) for the defendant.

AQUILINO, *Judge:* This action, which has been designated a test case pursuant to CIT Rule 84(b), challenges the method by which the U.S. Customs Service determined the "United States value" of

[12] *Id.* at 38.

[13] Intervenor's Brief at 33.

wearing apparel entered from Mexico before July 1, 1980 and the "deductive value" of similar merchandise entered after that date. The dispositive issue is one of law; no genuine issue of material fact is presented, and the parties, appropriately, have interposed cross-motions for summary judgment.

I

Those motions show, among other things, (1) that the merchandise was assembled abroad in whole or in part of fabricated components, the product of the United States within the meaning of item 807.00, TSUS; (2) that Customs correctly determined the value of those components; (3) that, pursuant to section 402(c) of the Tariff Act of 1930, as added by Pub. L. No. 84–927, § 2(a), 70 Stat. 943 (1956), the Service correctly determined the price of the merchandise which entered before July 1, 1980 and correctly subtracted therefrom expenses and costs covered by subsections (1) and (2) of section 402(c); (4) that, for the merchandise entered thereafter, Customs correctly determined the unit price and subtracted expenses and costs from it in accordance with 19 U.S.C. § 1401a(d)(2) and (d)(3)(A)(i) through (iii); (5) that, in its calculation of United States value, the Service subtracted the value of the components eligible for exemption from duty under item 807.00 from the merchandise price prior to reducing it by "the ordinary customs duties * * * currently payable on such or similar merchandise"; and (6) that, in its calculation of deductive value, Customs subtracted the value of the eligible components from the unit price before reducing it by "the customs duties * * * currently payable on the merchandise".

The reference to "ordinary customs duties" in section 402(c) was in the following context:

Sec. 402 Value.

(a) * * * [T]he value of imported merchandise for the purposes of this chapter shall be—

(1) the export value, or

(2) if the export value cannot be determined satisfactorily, then the United States value. * * *

* * * * * * *

UNITED STATES VALUE

(c) For the purposes of this section, the United States value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal market of the United States for domestic consumption, packed ready for delivery, in the usual wholesale quantities and in the ordinary course of trade, with allowances made for—

* * * * * * *

(3) the ordinary customs duties and other Federal taxes currently payable on such or similar merchandise by reason of its importation, and any Federal excise taxes on, or measured by the value of, such or similar merchandise, for which vendors at wholesale in the United States are ordinarily liable.

Deductive value was substituted for this provision by the Trade Agreements Act of 1979, Pub. L. No. 96–39, § 201(a), 93 Stat. 144, 194, 197 (1979). The resulting section, 19 U.S.C. § 1401a(d), states that the deductive value of the merchandise being appraised is whichever price is appropriate in accordance with subsections (2)(A)(i), (ii), or (iii), reduced by an amount equal to the sum of five enumerated factors, including:

(iv) the customs duties and other Federal taxes currently payable on the merchandise concerned by reason of its importation, and any Federal excise tax on, or measured by the value of, such merchandise for which vendors in the United States are ordinarily liable;. * * *[1]

The entries underlying this action occurred before and after the effective date of this substitution, July 1, 1980,[2] thereby necessitating the calculation of both United States and deductive value in this matter. Contrary to the approach taken by Customs, the plaintiff claims that

the proper method of calculating the United States value * * * of merchandise, in part, classifiable in item 807.00, TSUS, is to reduce the freely offered price by the "ordinary customs duties * * * currently payable on such or similar merchandise" prior to subtracting the value of the United States components eligible for the item 807 * * * duty exemption from the freely offered price.

* * * [T]he proper method of calculating the Deductive value * * * of merchandise, in part, classifiable in item 807.00, TSUS, is to reduce the sales price by the "Customs duties * * * currently payable on the merchandise concerned" prior to subtracting the value of the United States components eligible for item 807.00 * * * duty exemption from the sales price.[3]

The defendant counters that

(a) U.S.V. and D.V., contemplate a deduction of the actual duties assessed, rather than theoretical deductions of duties; (b) when the U.S.V. and D.V. bases of appraisement are read together with the language of item 807.00, TSUS, it is clear that Congress only contemplated the *amount* of duty assessed, *i.e.*, the duties currently payable, to be based upon the *rate* that is appropriate for the *entire* article, without commercial segregation of the American-made components, but after the value of

[1] 19 U.S.C. § 1401a(d)(3)(A)(iv).

[2] *See* Pub. L. No. 96–39, § 204(a), 93 Stat. 144, 202–03 (1979) and Proclamation No. 4768, 45 Fed. Reg. 45,135, 45,137 (June 28, 1980).

[3] Plaintiff's Statement of Material Facts as to Which There is No Genuine Issue to be Tried, paras. 17 and 18.

> the American-made components have [*sic*] been deducted from the value of the entire article.[4]

And it also argues that, under plaintiff's method, the deduction payed for would always be greater than the duties actually paid. Counsel depict this argument arithmetically (based on figures[5] for one of the pieces of wearing apparel imported) as follows:

	Customs method
Gross sales price per doz.	$16.50
General expenses and profit (deductions)	(4.50)
	12.00
Item 800.00 components (deductions)	(.318)
Adjusted sales price	11.68
Item 807.00, TSUS, United States fabricated components (deductions)	(6.89)
Dutiable value (including duties)	4.79
Divided by 100% plus rate of duty to ascertain value less duties ($4.79/132%)	3.63
Duty deduction to arrive at final value ($4.79 − 3.63)	1.16
Final value multiplied by rate of duty (3.63 × 32% to arrive at actual duty paid =	1.16

	Plaintiff's method
* * * * * *	*
Adjusted sales price	11.68[6]
Divide by 100% plus duty rate to ascertain value less duties ($11.68 divided by 132%)	8.85
Duty deduction used to arrive at claimed final U.S.V. or D.V. ($11.68 − 8.85)	2.83
Claimed dutiable value less item 807.00, TSUS, United States fabricated components ($8.85 − 6.89)	1.96
Final dutiable value multiplied by rate of duty to derive actual duties paid ($1.96 × 32%)	0.63 [7]

According to the defendant, as exemplified by these calculations, the Customs method results in deductions equaling the duties paid.

II

This action has been brought pursuant to 19 U.S.C. § 1515 and 28 U.S.C. § 1581(a). Section 2639(a)(1) of title 28, U.S.C. provides that, in such actions, the decision at issue "is presumed to be correct" and the "burden of proving otherwise shall rest upon the party challenging such decision."

In attempting to bear its burden, the plaintiff takes the position that deductive value is to be enforced in the same manner as United States value. The defendant does not argue otherwise,[8] and the court concurs. *See, e.g.*, S.Rep. 249, 96th Cong., 1st Sess. 122 (1979).

[4] Defendant's Memorandum, p. 3 (emphasis in original).

[5] *See* Defendant's Statement of Material Facts as to Which There is No Genuine Issue to be Tried, para. 24.

[6] The path to this adjusted sales price is the same as shown under the Customs Method and therefore has not been repeated, in the interest of brevity.

[7] Defendant's Memorandum, p. 7. *Cf.* Plaintiff's Memorandum, p. 7.

[8] *See* Defendant's Memorandum, p. 5, n. 1; Defendant's Response to Plaintiff's Memorandum of Law in Reply, p. 3.

There is sharp disagreement, however, as to the meaning of "ordinary customs duties * * * currently payable on such or similar merchandise" from former section 402(c), *supra,* and of "customs duties * * * currently payable on the merchandise", as enacted in 1979. The plaintiff argues that neither reference signifies actual duties paid, although conceding that the latter formulation

> is more closely akin to the interpretation proposed by the Government[;] it nevertheless does not require a deduction for duties actually ultimately assessed, and in the absence of a clear indication that Congress intended to change the substance of this deduction when it enacted the Trade Agreements Act of 1979, must be interpreted in the same manner as the U.S. value law.[9]

The defendant takes the position that,

> since the clear language of D.V. unequivocally mandates a deduction of the actual duties paid, the clear language of D.V. amply demonstrates Congress' intent in that regard * * *. Therefore, since there was no dispute that the duty deduction for D.V. and U.S.V. operate in the same manner, it is equally clear that U.S.V. mandates a deduction limited to the actual duty paid.[10]

The court is unable to perceive the meaning as "clearly" as either party proclaims. Indeed, were there such clarity, this opinion might not be called for. Since it is, the court has had to consider legislative history, in particular that of the 1979 act, which states that deductive value "would be determined by subtracting from [imported goods'] resale price in the United States specific elements of value that have been added to the goods, *i.e.,* customs duties, selling expenses, etc., to arrive at a value comparable to the transaction value."[11] To the extent the focus is on "ordinary" customs duties (from the former statute), that congressional choice of word was apparently intended to distinguish them from extra-ordinary duties, like those for dumping or to countervail export subsidies. *Cf. Alberta Gas Chemicals, Inc.* v. *Blumenthal,* 82 Cust. Ct. 77, 81–82, C.D. 4792, 467 F. Supp. 1245, 1249–50 (1979). The implication the plaintiff prefers, "potential" as opposed to "actual", is not as strong. Moreover, while "currently payable" hardly amounts to the past participle of pay, the terminology does imply to-be-paid and also legislative recognition that the process established by the Tariff Act of 1930 to arrive at the moment of final reckoning, entailing classification, appraisement, liquidation and then payment, requires more time than necessarily has past when appraisement takes place. Hence, the court concludes that the Customs concept of duties "currently payable" is a proper one.

[9]Plaintiff's Memorandum of Law in Reply, p. 2, n. 1.

[10]Defendant's Response, p. 3 (citation omitted).

[11]S.Rep. 249, 96th Cong., 1st Sess. 21 (1979). Under the act, transaction value does not include, if identifiable, the "customs duties * * * currently payable on the imported merchandise by reason of its importation". 19 U.S.C. § 1401a(b)(3)(B).

Item 807.00, TSUS provides for a "duty upon the full value of the imported article, less the cost or value of * * * products of the United States" included therein. As indicated above, in this action the Service subtracted such cost or value before deducting the duties currently payable. The plaintiff demands duty deduction at the outset, arguing that

> the Government has confused two distinct requirements: (1) the statutory mandate to find an "appraised value" of merchandise; and (2) the determination of the amount of duty payable on the article, through the application of a rate of duty to the appraised value. Thus, * * * the Government's proposed methodology ignores the statutory requirement that the Customs Service must initially appraise the merchandise, and in so doing determine "the full value of the imported article." It is only after the merchandise is appraised that the value of American-made components may be deducted from the appraised value pursuant to item 807.00, TSUS in order to determine the duty due. The merchandise in issue, therefore, must first be appraised as if the imported articles had not contained qualifying * * * American-made components, thereby requiring the Customs Service to calculate the deduction for duty prior to subtracting the value of the U.S. components eligible for the item 807.00 * * * duty exemption.

Plaintiff's Memorandum, p. 4. However, in *Millmaster International, Inc.* v. *United States,* 427 F.2d 811, 815 (CCPA 1970), the court recited with approval the statement in its earlier decision in *United States* v. *International Packers, Ltd.,* 48 CCPA 80, 86, C.A.D. 769 (1961), that what an appraiser does when he employs the United States value basis is to "work back" to an approximate foreign value of the imported merchandise.

Here, the defendant relies on Headnote 3(b), which governs item 807.00, TSUS. It states:

> 3. *Articles assembled abroad with components produced in the United States.—*
>
> * * * * * * *
>
> (b) The duty on the imported article shall be at the rate which would apply to the imported article itself, as an entirety without constructive separation of its components, in its condition as imported if it were not within the purview of this subpart. If the imported article is subject to a specific or compound rate of duty, the total duties shall be reduced in such proportion as the cost or value of such products of the United States bears to the full value of the imported article.

Two propositions are apparent from this section of the statute. The first is that the imported article, as an entirety, is determinative of the rate of duty, while the second mandates reduction of duties correlative to the article's U.S. component(s). What is not indicated is that the article, as a whole, is determinative of the duties

currently payable, ergo the approach taken by Customs was not inconsistent with the statute.

The plaintiff points to a regulation, 19 C.F.R. § 10.18(a) (1980),[12] and to Customs Pub. No. 536, *807 Guide* (Import Requirements on Articles Assembled Abroad from U.S. Components (Item 807.00 TSUS) (rev. July 1985). Each, on its face, lends support,[13] but not enough to lead this court to conclude that Congress intended that statutory full value under item 807.00 result in a greater duty deduction than the amount of duties actually payable.[14] As the courts have stated,

> the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

Consumer Product Safety Comm'n v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). *See, e.g., Madison Galleries, Ltd.* v. *United States*, 870 F.2d 627, 629–30 (Fed.Cir. 1989); *Moss Manufacturing Co.* v. *United States*, 13 CIT ——, ——, Slip Op. 89–70, at 9 (May 22, 1989). Following this "familiar canon of statutory construction", this court is unable to discern a clearly expressed legislative intention that the Customs Service apply item 807.00, TSUS other than occurred in this matter.

III

The plaintiff also attempts to rely on a number of court decisions. *Parrot* v. *United States*, 26 Cust. Ct. 102, C.D. 1308 (1951), *aff'd*, 40 CCPA 8, C.A.D. 490 (1952), however, supports the defendant here. In that case, the issue was the rate of duty applicable to a yacht from Canada constructed partially with U.S. components. Both courts concurred that, although exempt from duty, the components were part of the entirety for purposes of determining the rate, but not the amount, of duty payable. *Accord: C.J. Tower & Sons* v. *United States*, 33 Cust. Ct. 14, 24, C.D. 1628 (1954); *Border Brokerage Co.* v. *United States*, 44 Cust. Ct. 688, 691, Reap. Dec. 9687 (1960); *United States* v. *Oakville Company*, 402 F.2d 1016, 1020 (CCPA 1968).

In yet another case relied on by the plaintiff, *John V. Carr & Son, Inc.* v. *United States*, 55 CCPA 111, C.A.D. 942 (1968), the court once again reaffirmed the approach in *Parrot* and other, earlier decisions that the starting point in appraising articles of mixed foreign and

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[12]The text of this regulation, at the time, was as follows:

> *Statutory basis used in valuation.* As in the case of the appraisement of any other imported merchandise, * * * the full value of assembled articles imported under item 807.00 * * * is determined in accordance with the appropriate statutory basis.

[13]*But cf., e.g.*, Customs Handbook 3600–03, Fundamentals of Customs Tariff & Trade Operations, p. 6–42 (May 1983):

> The mathematics of deducting duty is as follows: make all authorized deductions until there remains only the sum of the dutiable value of the merchandise and duty. If the duty is compound, deduct the specific rate. Divide the remainder by one plus the rate of duty. This will have the effect of removing the ad valorem duty and leave only the dutiable value.

[14]The defendant contends that the differential herein would be some 350 percent, a result not refuted by the plaintiff on the numbers.

domestic content is the merchandise as an entirety. In sum, neither that case, which did not involve item 807.00, nor any other decision cited by the parties in this action is dispositive of the precise issue before this court.

The court is thus left to conclude, in view of the foregoing points of discussion, that the plaintiff has not borne its burden of persuasion that the Customs Service took an incorrect approach in appraising the wearing apparel at issue. Plaintiff's motion for summary judgment must therefore be denied, with judgment to enter in favor of the defendant on its cross-motion.

(Slip Op. 89-129)

SHARP ELECTRONICS CORP., PLAINTIFF *v.* UNITED STATES, DEPARTMENT OF COMMERCE, ROBERT A. MOSBACHER, SECRETARY OF COMMERCE, DEFENDANTS

Court No. 88-08-00641

[Defendants' motion to dismiss granted.]

(Decided September 13, 1989)

Donovan Leisure Newton & Irvine (*Peter J. Gartland* and *Thomas R. Trowbridge, III*) for plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis*), for defendants.

OPINION

TSOUCALAS, *Judge:* Plaintiff, Sharp Electronics Corporation, brings this action seeking declaratory judgment under 28 U.S.C. § 1581(i) (1982) with respect to a settlement agreement entered into with the United States Department of Commerce (Commerce). The settlement agreement involved T.D. 71-76, an antidumping duty order covering television receiving sets, monochrome and color, from Japan. Defendants move to dismiss for lack of jurisdiction on three alternative grounds: (1) plaintiff's claim is tantamount to an action in contract, not involving the administration and enforcement of the customs laws; (2) the action is premature; and (3) the action is duplicative.

BACKGROUND

On April 28, 1980, Sharp Electronics Corporation, Commerce and other government entities[1] entered into a settlement agreement regarding T.D. 71-76. In the agreement, the United States allegedly agreed to use the "traditional methodology" in calculating foreign

[1]The United States Treasury Department; United States Customs Service (Customs); and the United States Department of Justice.

market value and United States prices for the appraisement or liquidation of entries of television receivers from Japan after March 31, 1979. *See* Complaint at 2¶ 10.

Plaintiff essentially seeks a declaratory judgment not only rendering the agreement valid and enforceable, but also requiring that the government use the methodology contemplated in the agreement. *See* Complaint at 4. Defendants argue that the Court lacks jurisdiction because this action involves subject matter specifically reserved for the district courts, *i.e.*, the interpretation of the terms of a contract, rather than a matter which involves the administration and enforcement of the trade laws as required for jurisdiction under § 1581(i). Defendants further argue that even if the Court exercises jurisdiction under the contract claim, the action is premature because it is presently unknown "precisely what methodology Commerce will employ or what justification Commerce may have for any change in methodology it may make." Defendants' Reply at 7–8. Defendants also submit that plaintiff may, in fact, be satisfied with Commerce's final results, in which case no court action would be necessary. Defendants lastly assert that this action is duplicative of a pending proceeding, *Sharp Corp.* v. *United States*, Court No. 86–10–01299, in which the plaintiff has raised a "traditional methodology" claim. *See* Defendants' Memorandum in Support of Defendants' Motion to Dismiss at 6.

Discussion

A. *Jurisdiction:*

The initial issue to be resolved is whether plaintiff's claim is essentially contract-based and does not, therefore, involve the administration and enforcement of the trade laws as required for jurisdiction under § 1581(i).

Section 1581(i)(4) provides this Court with jurisdiction over "any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for * * * administration and enforcement with respect to the [trade laws]." Congress implemented this section for the purpose of delineating customs-related matters over which the Court of International Trade would have exclusive jurisdiction from matters reserved for the district courts. H.R. Rep. No. 1235, 96th Cong., 2d Sess. 47, *reprinted in* 1980 U.S. Code Cong. & Admin. News 3729, 3758–59; *see generally Nat'l Corn Growers Ass'n* v. *Baker*, 840 F.2d 1547, 1555–59 (Fed. Cir. 1988). In making this jurisdictional demarcation, Congress intended the special expertise of the Court of International Trade to be used to "ensure greater efficiency in judicial resources and uniformity in the judicial decisionmaking process." H.R. Rep. No. 1235, 96th Cong., 2d Sess. 20, *reprinted in* 1980 U.S. Code Cong. & Admin. News 3729, 3731.

Congress, however, was careful not to "commit to the Court of International Trade's exclusive jurisdiction *every* suit against the Government challenging customs-related laws and regulations." *K Mart Corp.* v. *Cartier, Inc.*, 108 S. Ct. 950, 958 (1988) (emphasis in original). In establishing § 1581(i), Congress expressly proscribed the creation of any new causes of action. *See* H.R. Rep. No. 1235, 96th Cong., 2d Sess. 33, *reprinted in* 1980 U.S. Code Cong. & Admin. News 3729, 3745. Contract claims which are divorced from the body of customs laws fall within the proscribed category. On the other hand, contract claims that *directly challenge* the administration and enforcement of customs laws properly invoke the jurisdiction of the court. *See Old Republic Insurance Co.* v. *United States*, 10 CIT 589, 597–98, 645 F. Supp. 943, 950–52 (1986).

The *Old Republic* court exercised jurisdiction under § 1581(i) in an action against Customs for material breach of a surety bond contract because the claim "call[ed] for the proper application of a customs regulation." *Id.* at 598, 645 F. Supp. at 952. The Court finds the instant action analogous to *Old Republic*, notwithstanding defendants' assertions to the contrary.

The thrust of the complaint here involves the interpretation of a settlement agreement which allegedly obligates the United States to use the "traditional methodology" in calculating foreign market value and United States prices for the appraisement and liquidation of entries covered under T.D. 71–76. In order to precisely define and interpret the term "traditional methodology" as used in the settlement agreement, the Court must analyze and apply the antidumping duty laws. Even if the settlement agreement adequately defines the term "traditional methodology," resolution of whether the term is being properly implemented requires particularized knowledge and proficiency with the antidumping duty laws. Therefore, the Court cannot accept defendants' position that the a present action strictly seeks to compel implementation of the particular terms of the settlement agreement without challenging the substance of the antidumping duty order. Moreover, the legislative history demonstrates that Congress intended § 1581(i) to grant the court broad residual jurisdiction.[2] H.R. Rep. No. 1235, 96th Cong., 2d Sess. 33, 47, *reprinted in* 1980 U.S. Code Cong. & Admin. News 3729, 3745, 3758–59. For these reasons, the Court finds that plaintiff's claim challenges the administration and enforcement of the antidumping duty laws, and that jurisdiction is proper under § 1581(i)(4). The Court, however, finds that despite jurisdiction under this provision, the action is premature.

[2]As originally proposed, § 1581(i) granted this court jurisdiction over "civil actions which arise *directly out of an import transaction and involve one of the many international trade laws.*" H.R. Rep. No. 1235, 96th Cong., 2d Sess. 33, *reprinted in* 1980 U.S. Code Cong. & Admin. News 3729, 3745 (emphasis added). However, the Subcommittee on Trade expressed concern over the ambiguous wording of this subsection and recommended a more generic approach "to provide *greater* protection for the rights of persons involved in disputes arising out of import transactions." *Id.* (emphasis added). In response to this concern, the full Judiciary Committee adopted proposed § 1581(i), which provided the Court with jurisdiction "over those civil actions which *arise out of a law of the United States pertaining to international trade.*" *Id.* (emphasis added).

B. *Ripeness:*

The ripeness issue is controlled by the decision in *Matsushita Elec. Indus. Co.* v. *United States,* 12 CIT ——, 688 F. Supp. 617, *aff'd,* 861 F.2d 257 (Fed. Cir. 1988). In *Matsushita,* as in the instant case, the United States agreed to use the "traditional methodology" when conducting administrative reviews pursuant to the antidumping finding covering television receiving sets, monochrome and color, from Japan under T.D. 71-76. In dismissing plaintiff's claim because the matter had not ripened to the point where judicial review was appropriate, the court in *Matsushita* stated that the question of methodology will be reviewable upon a challenge to the final revocation decision, and "[t]he possibility exists that the final agency determination may indicate that there was no dumping, in which event the plaintiffs would presumably find no reason to complain." *Id.* at ——, 688 F. Supp. at 622[3] (quoting *Special Commodity Group* v. *Baldridge,* 6 CIT 264, 269, 575 F. Supp. 1288, 1293 (1983)).

The Court is not persuaded that sufficient justification exists upon which to distinguish the case at bar from *Matsushita.* As in *Matsushita,* the methodology Commerce will employ in the administrative review is not precisely known. Plaintiff merely speculates that Commerce will deviate from the "traditional methodology" as specified in the settlement agreement, resulting in the prevention of a final revocation order. Even if Commerce chooses not to employ the "traditional methodology," Commerce may still reach a final determination which revokes the antidumping duty order. Such action would in all probability dispense with any reason plaintiff would have to seek judicial review in this Court. If, on the other hand, Commerce does not calculate the foreign market value and United States prices for the appraisement and liquidation of entries using the "traditional methodology," the question of methodology will be reviewable, under 28 U.S.C. § 1581(c), upon a challenge to the final determination. Plaintiff, then, will have an adequate remedy.

To the extent Commerce has not rendered a final administrative decision and plaintiff has not experienced its effects, "it is more accurate to characterize the failure of this action as due to the exercise of the Court's discretion not to entertain actions which are not ripe. It is not due to a congenital lack of jurisdiction over these matters." *Krupp Stahl AG* v. *United States,* 4 CIT 244, 247, 553 F. Supp. 394, 396 (1982). Therefore, the action is dismissed as not yet ripe for

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[3]The Court of Appeals for the Federal Circuit affirmed, stating:

> We agree with the Court of International Trade that any issue with respect to the methodology Commerce will use in conducting the reviews is not ripe for adjudication. At this time we do not know precisely what methodology Commerce will employ or what justification Commerce may have for any change in methodology it may make. Moreover, it is possible that Commerce may finally revoke the dumping order under whatever methodology it employs. If that happens, Matsushita would not be injured by any change in methodology, and there would be no reason for it to seek judicial review or for us to decide the issue. *FTC* v. *Standard Oil Co.,* 449 U.S. 232, 244 (1980). On the other hand, if Commerce should not issue a final revocation order, the question of methodology will be reviewable upon a judicial challenge to that determination. We agree with the Court of International Trade that judicial intervention into Commerce's apparent change of methodology, including its consistency with the settlement agreement, is unwarranted at this state.

Matsushita, 861 F.2d at 260.

decision. This resolution obviates the need to address the issue of duplicity.

(Slip Op. 89-130)

CARISBROOK INDUSTRIES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court Nos. 86-08-01020, 86-10-01260, and 86-10-01261

[Court No. 86-08-01020 reinstated.]

(Dated September 14, 1989)

Sharretts, Paley, Carter & Blauvelt (Gail T. Cumins) for plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, (*James A. Curley*), Civil Division, United States Department of Justice, for defendant.

OPINION

RESTANI, *Judge:* Plaintiff moves to vacate dismissal of three actions. Two of these actions, Court Nos. 86-10-01260 and 86-10-01261, were dismissed on November 9, 1987 for lack of prosecution. More than one year later, plaintiff filed a motion for vacation of dismissal of all three actions under Rule 60(b)(1) of this court. Rule 60(b) of this court states that: "The motion [for relief from a final judgment] *shall* be made within a reasonable time, and for [mistake, inadvertence, surprise, or excusable neglect] not more than one year after the judgment, order, or proceeding was entered or taken." The rule requires such motions to be filed at the latest within one year of dismissal. Whether or not the original dismissal was the result of mistake, inadvertence, surprise, or excusable neglect; plaintiff has not provided a convincing reason as to why this court should ignore Rule 60(b).

The court is aware that at the time of the initial filing of these motions, a conflict existed in the opinions of this court regarding the allowable time for motions to vacate judgment based on the type of reasons listed in Rule 60(b). In *Bio-Rad Laboratories* v. *United States,* 12 CIT ——, 687 F. Supp. 1580 (1988), this court ruled that Rule 60(b) time periods apply to motions such as this and that 28 U.S.C. § 2646, allowing only 30 days to file a motion for a rehearing, did not apply. In *Rhone Poulenc, Inc.* v. *United States,* 12 CIT ——, 694 F. Supp. 1579 (1988), *rev'd* No. 88-1602 (Fed. Cir. July 14, 1989), however, this Court held that § 2646 did apply to calculation of the time to file such a motion for relief from dismissal. Apparently plaintiff's agent learned of the *Bio-Rad* case when there were almost three months left to make certain a motion to vacate was timely filed. Assuming *arguendo* that the one-year limit was waivable, plaintiff has proffered no reason which would indicate that the one-year time limit could not have been met. Accordingly, plaintiff's

motions to vacate the dismissal orders in Court Nos. 86–10–01260 and 86–10–01261 are denied.

Court No. 86–08–01020 is in a different posture. That action was dismissed on March 9, 1988. Less than one year later, however, counsel, on February 7, 1989, filed a motion to vacate that dismissal. Apparently, former counsel failed to seek amendment of the docket sheet to reflect a change of address; thus counsel may not have received notices from the court alerting him that the action was threatened with dismissal. Whether this is the reason the case was not prosecuted is not clear from the affidavits filed with the pending motion.[1] The record indicates, however, that in late 1987 counsel then of record was having physical and psychological difficulties which contributed to his failure to monitor cases properly. From the affidavits filed herein it does not appear that those problems were solved by March of 1988. Plaintiff, however, learned of the dismissal in April 1988 and, in the summer of 1988, of former counsel's disabilities and of the possibility that the case could be restored.

On December 2, 1988, plaintiff's new counsel sought to have the action restored under Court Rule 60(b)(1). This initial filing was rejected by the Clerk of the Court under Court Rule 82(d), because of plaintiff's failure to comply with the procedural rules or practice of this court. Another motion for relief from the order of dismissal of March 9, 1988 was filed on February 7, 1989. Although it is not entirely clear why a proper Rule 60(b) motion could not have been filed sooner, the one-year time limit was met. The confusion as to the controlling law, the attempt to file in December, and the lack of a showing of any prejudice to defendant by the delay of several months in the filing of this motion, prompt the court to allow reinstatement. Although plaintiff is responsible for the actions of counsel it employs, the court concludes that there has been a consistent intention to prosecute this action; that plaintiff has been injured enough by dismissal of its other two actions; and that, weighing all equities, plaintiff should have its day in court. Accordingly, Court No. 86–08–01020 is reinstated under Rule 60(b)(1) of this Court and the action shall be restored to the Reserve Calendar for 120 days.

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[1] The case was dismissed under Rule 83(c), which provides that a case remaining on the Reserve Calendar for more than twelve months shall be dismissed.

(Slip Op. 89-131)

SANDVIK AB, AB SANDVIK STEEL AND SANDVIK STEEL CO., PLAINTIFFS *v.* UNITED STATES, U.S. DEPARTMENT OF COMMERCE, AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS, AND AL TECH SPECIALTY STEEL CORP. AND CARPENTER TECHNOLOGY CORP., DEFENDANT-INTERVENORS

Court No. 87-12-01211

[Judgment for defendants; case dismissed.]

(Decided September 14, 1989)

Akin, Gump, Strauss, Hauer & Feld (*Warren E. Connelly, Rory F. Quirk*) for the plaintiffs Sandvik AB, AB Sandvik Steel and Sandvik Steel Company.

Stuart E. Schiffer, Acting Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*M. Martha Ries*); *Lyn M. Schlitt*, General Counsel, *James A. Toupin*, Assistant General Counsel, United States International Trade Commission (*Timothy M. Reif*); *Matthew P. Jaffe*, of Counsel, Office of the Chief Counsel for Import Administration, United States Department of Commerce.

Collier, Shannon, Rill & Scott (*David A. Hartquist*) for defendant-intervenors Al Tech Specialty Steel Corporation and Carpenter Technology Corporation.

OPINION AND JUDGMENT

CARMAN, *Judge:* Sandvik AB, AB Sandvik Steel and Sandvik Steel Company (hereinafter plaintiffs) move pursuant to Rule 56.1 for judgment upon the agency record contending that the final affirmative determination of the United States International Trade Commission (hereinafter ITC) in *Stainless Steel Pipes and Tubes from Sweden*, USITC Pub. No. 2033 (Nov. 1987) 52 Fed. Reg. 45,256 (Nov. 25, 1987) and the final affirmative determination of the Department of Commerce, International Trade Administration (hereinafter Commerce or ITA) in *Final Determination of Sales at Less Than Fair Value; Stainless Steel Hollow Products From Sweden*, 52 Fed. Reg. 37,810 (Oct. 9, 1987) *as amended* 52 Fed. Reg. 45,985 (Dec. 3, 1987) are not supported by substantial evidence on the record or otherwise not in accordance with law. Defendants and defendant-intervenors oppose the motion and seek affirmation of the determinations.

BACKGROUND

The ITA received on October 17, 1986 a petition filed by the Specialty Tubing Group (hereinafter Specialty Tubing), which was amended to include the United Steelworkers of America (hereinafter United Steelworkers) on February 6, 1987, on behalf of the United States domestic industry producing certain stainless steel hollow products (hereinafter SSHP) alleging that imports of SSHP were being or were likely to be sold in the United States at less than fair value and that imports were causing material injury or threatened material injury to a United States industry. Specialty Tubing was made up of six domestic producers, two of which were defendant-intervenors Al Tech Specialty Steel Corporation (hereinafter Al Tech)

and Carpenter Technology Corporation (hereinafter Carpenter) who produced the seamless SSHP. The ITA made a preliminary affirmative determination and notified the ITC. *Certain Stainless Steel Hollow Products From Sweden; Preliminary Determination of Sales at Less Than Fair Value*, 52 Fed. Reg. 19,369 (May 22, 1987).

The ITC determined that an industry in the United States was materially injured by reason of imports from Sweden of seamless stainless steel pipes, tubes, hollow bars and blanks that had been found by the ITA to have been sold at less than fair value in the United States. USITC Pub. No. 2033 at 1. The ITC found that there was no material injury or threat of material injury and that an industry within the United States was not materially retarded by reasons of imports from Sweden of welded stainless steel pipes, tubes hollow bars and blanks that had been found by the ITA to have been sold in the United States at less than fair value. *Id.*

Contentions of the Parties

Plaintiffs' Contentions:

Plaintiffs make the following contentions:

(1) petitioners did not have standing to file their petition for the following reasons:

(a) a majority of the domestic industry did not support the petition;

(b) petitioners have an affirmative burden of proving that they represent a majority of the domestic industry;

(c) the United Steelworkers do not satisfy the interested party requirement of the statute; and

(d) the ITA based its standing determination on the class or kind of merchandise as opposed to whether the merchandise was a like product.

(2) The material injury causation analysis of the ITC was flawed for the following reasons:

(a) the ITC failed to recognize the distorting impact of the data of domestic producer Babcock & Wilcox which left the seamless stainless steel pipe and tube industry in 1985;

(b) the ITC failed to analyze correctly the data gathered concerning the indicators of material injury and causation;

(c) redrawers, also known as non-integrated producers, were included as part of the domestic industry, but were not included in the analysis of whether the domestic industry suffered material harm; and

(d) Sandvik Steel Company, a domestic producer of seamless stainless steel pipes and tubes, was erroneously excluded from the domestic industry for the purposes of the ITC's injury analysis on the ground that it was a related party.

(3) The ITC erroneously found that the alleged material injury suffered by the domestic industry was caused by less than fair value imports from Sweden.

(4) The determination of sales made by Sandvik at less than fair value was flawed for the following reasons:

(a) the ITA erroneously deducted from its calculation of the United States Price in exporter's sales price transactions, part of the profit which Sandvik Steel Company made on its domestic sales of products which it further processed;

(b) the ITA failed to match comparable quantities of merchandise sold in the United States and in the home market (or third country). Where such matches could not be made, the ITA failed to make any adjustment for the effect of quantity on price despite plaintiffs' demonstration of the relationship between quantity and price; and

(c) the ITA erroneously calculated the United States price on the basis of sales which plaintiffs made to an unrelated reseller located in a third country.[1]

Defendants' Contentions:

Defendant ITA contends the following determinations were reasonable, supported by substantial evidence on the record and in accordance with law:

(a) the ITA's initiation of the antidumping duty investigation;

(b) the ITA's determination that the petition was filed on behalf of the domestic industry;

(c) the ITA's determination that the United Steelworkers were properly joined as a co-petitioner;

(d) the ITA's determination to deduct from the exporter's sales price the profit associated with the cost of additional manufacture and sale of finished product in the United States;

(e) the ITA's denial of Sandvik's claimed quantity adjustment;

(f) the ITA's determination to include within its purchase price calculations, sales from Sandvik to an unrelated middleman.

Defendant ITC contends its determination, including the following specific decisions, was reasonable, supported by substantial evidence on the record and in accordance with law:

(a) the ITC's decision to exclude data for Sandvik Steel Company from the domestic industry data under the related parties provision of the statute;

(b) the ITC's analysis which explicitly described and considered data for redrawers as well as integrated producers in its material injury analysis;

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[1]In their reply brief, plaintiffs withdrew their contention that the ITA failed to adjust foreign market values to reflect the difference in production costs when matching sales of hollow bar in the United States with sales of hollow bar in Sweden. Plaintiffs' Reply to the Memoranda of Defendants and Defendant-Intervenors in Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record at 101.

(c) the ITC's analysis of data relating to the condition of the domestic industry as a whole, including aggregate data for integrated producers; and

(d) the ITC's analysis of the volume of the subject imports and their price effects.

Defendant-Intervenors' Contentions:

Defendant-intervenors Al Tech and Carpenter Corporation contend that the final affirmative determinations of the ITA and the ITC should be affirmed in all respects.

STANDARD OF REVIEW

In reviewing an antidumping investigation and determination, this Court must hold unlawful any determination unsupported by substantial evidence on the record or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1982). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co.* v. *Labor Board,* 305 U.S. 197, 229 (1938)). "[T]he court may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo* * * *.'" *American Spring Wire Corp.* v. *United States,* 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984) (quoting *Universal Camera* 340 U.S. at 488), *aff'd sub nom. Armco, Inc.* v. *United States,* 3 Fed. Cir. (T) 123, 760 F.2d 249 (1985).

STANDING

Pursuant to section 1673a of 19 U.S.C., there are two methods of initiating an antidumping duty investigation. The investigation may be commenced by either the ITA on its own initiative (19 U.S.C. § 1673a(a)) or by the filing of a petition (19 U.S.C. § 1673a(b)) as was done by Specialty Tubing in the instant case. This petition was amended to include the United Steelworkers. The ITA determined that the petitioners had satisfied the requirements as set out in 19 U.S.C. § 1673a(b)(1). The Statute reads as follows:

(b) Initiation by petition

(1) Petition requirements

An antidumping proceeding shall be commenced whenever an interested party described in subparagraph (C), (D), (E), or (F) of section 1677(9) of this title files a petition with the administering authority, on behalf of an industry, which alleges the elements necessary for the imposition of the duty imposed by section 1673 of this title, and which is accompanied by information reasonably available to the petitioner supporting those allegations. The petition may be amended at such time, and upon such conditions, as the administering authority and the Commission may permit.

19 U.S.C. § 1673a(b)(1) (1982 & Supp. V 1987).

An "interested party" includes "a manufacturer, producer, or wholesaler in the United States of a like product," 19 U.S.C. § 1677(9)(C) (1982), as well as "a certified union or recognized union group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a like product," 19 U.S.C. § 1677(9)(D) (1982 & Supp. V 1987).

A "like product" is defined as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this subtitle." 19 U.S.C. § 1677(10) (1982).

"Industry" is defined as "the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product * * *." 19 U.S.C. § 1677(4)(A) (1982 & Supp. V 1987).

Plaintiffs contend that Specialty Tubing and the United Steelworkers of America did not bring their petition on behalf of the domestic industry producing the merchandise and thus lacked standing.

The two statutory requirements for standing were outlined in *Gilmore Steel Corp.* v. *United States,* 7 CIT 219, 585 F. Supp. 670 (1984). The petitioner must be an interested party and must show that a majority of the industry supports the petition. 7 CIT at 226, 585 F. Supp. at 676.

In the instant case, plaintiffs make three contentions: (1) Specialty Tubing and the United Steelworkers have an affirmative burden of proving that they represent a majority of the domestic industry; (2) the United Steelworkers do not satisfy the interested party requirement of the statute; and (3) the ITA based its standing determination on the class or kind of merchandise as opposed to whether the merchandise was a like product.

Representing a Majority of the Domestic Industry:

Plaintiffs' claim that the petitioners have an affirmative burden of proving they represent a majority of the industry is unfounded. This Court has recently looked at the standing issue and determined that "[n]either the statute nor Commerce's regulations require a petitioner to establish affirmatively that it has the support of a majority of a particular industry, and the Court declines to impose such a requirement." *Citrosuco Paulista, S.A.* v. *United States,* 12 CIT ——, 704 F. Supp. 1075, 1085 (1988). The ITA has stated that such a requirement "would be so onerous as to preclude access to import relief under the antidumping and countervailing duty laws." *Frozen Concentrated Orange Juice From Brazil: Final Determination of Sales at Less Than Fair Value,* 52 Fed. Reg. 8,324, 8,325 (Mar. 17, 1985).

The ITA stated in its final determination in the instant case:

> Where domestic industry members opposing an investigation provide a clear indication that there are grounds to doubt a petitioner's standing, the Department will review whether the opposing parties do, in fact, represent a major proportion of the domestic industry. In this case, we have not received any opposition from the domestic industry.

52 Fed. Reg. at 37,812.

This Court follows *Citrosuco Paulista* in holding that petitioners do not have a burden of proving they represent a majority of the domestic industry.

Interested Party:

Plaintiffs contend that the United Steelworkers are not an interested party because they could not meet the two-step requirements of (1) representing workers in the domestic industry and (2) representing workers employed by producers whose collective output constitutes a majority of the domestic industry. Plaintiffs claim that this two-step test is derived from the two-part test in *Gilmore Steel* which was stated *supra* (the petitioner must be an interested party and must show that a majority of the industry supports its petition). Plaintiffs also contend that this two-step requirement determines whether the union workers are "representative of an industry."

Plaintiffs are misstating the requirements for an "interested party." As stated earlier an "interested party" may include "a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a like product." 19 U.S.C. § 1677(9)(D). The United Steelworkers certainly qualify as a recognized union group of workers engaged in the production of a like product since they represent workers at the majority of all integrated seamless stainless steel pipe and tube producers as well as workers at redraw mills that manufacture a majority of all products produced by United States redrawers other than plaintiffs. ITA Record Document (hereinafter ITA R.) 52, 53; ITA Confidential Document (hereinafter ITA C.) 10.

This Court holds that the ITA's determination that the United Steelworkers had standing was reasonable, supported by substantial evidence on the record and otherwise in accordance with law.

Class or Kind Versus Like Product:

Plaintiffs argue that the ITA improperly determined that seamless and welded SSHP were one like product. If the ITA had determined, as did the ITC, that these SSHPs were separate like products, plaintiffs contend that Specialty Tubing would not have standing to initiate the petition.

Plaintiffs' contention confuses the separate roles of the ITC and the ITA as well as the time sequence in which the two interact.

According to statute, the ITA must determine within twenty days after the filing of a petition whether that petition sets forth the allegations and information necessary for initiating an antidumping investigation. 19 U.S.C. § 1673a(c) (1982). The ITA's standing determination is for the limited purpose of deciding whether petitioners have filed "on behalf of the domestic industry." The ITA relies upon the petitioners' representations regarding the definitions of like product and domestic industry. Specialty Tubing in its petition, defied the industry to include both seamless and welded stainless steel pipe and tube. ITA R. 1 at 4; ITA C. 1 at 4. Specialty Tubing stated that it was "filing th[e] petition of behalf of U.S. producers of specialty tubing." ITA R. 1 at 2.

The ITA initiated the investigation based upon Specialty Tubing's representations and then notified the ITC. *Initiation of Antidumping Duty Investigations; Certain Stainless Steel Hollow Products From Sweden,* 51 Fed. Reg. 41,514 (Nov. 17, 1986). It was after this notification that the ITC began its investigation, made its determination of material injury and defined the domestic industry and like product. USITC Pub. No. 2033 at 1, 3–5. The fact that the ITC determined that seamless and welded SSHP constituted separate like products had no bearing on the ITA's determination that the petitioners had standing. The ITA's standing determination is made within the first twenty day period after the filing of the petition and is not connected in any way with the ITC's like product determination which is a separate determination for the purpose of determining injury.

Plaintiffs' further contention that the ITA based its standing determination on the class or kind of merchandise instead of the like product is erroneous. This contention is based upon the ITA's response to plaintiffs' Comment 2 of the final determination in which plaintiffs argued two separate issues: (1) lack of standing of the petitioners and (2) seamless and welded SSHP as a separate class or kind of merchandise. 52 Fed. Reg. at 37,812. The ITA's response, "We consider all products covered by this investigation to constitute a single class or kind of merchandise as stated in our response to Comment 1" is an answer to plaintiffs' comment, "Sandvik argues that seamless SSHP is a separate class or kind of merchandise, therefore, petitioners must represent the affected industry." *Id.* In responding to Comment 2, the ITA referred back to its response to Comment 1 which was limited to the sole issue of class or kind of merchandise. The ITA then moved on to discuss the standing issue which plaintiffs had combined with the class or kind issue. Any supposition by plaintiffs that the ITA used the class or kind designation instead of the like product is clearly mistaken.

Material Injury Causation Analysis

Plaintiffs claim that the material injury causation analysis of the ITC was flawed because: (1) the distorting impact of Babcock & Wilcox was not recognized; (2) the data concerning indicators of material injury and causation were not analyzed correctly; (3) redrawers were included as part of the domestic industry, but excluded from the material harm analysis; and (4) Sandvik Steel Company, a domestic producer of seamless stainless steel pipes and tubes, was erroneously excluded from the domestic industry as a related party. The Court will examine each issue separately in order to determine whether the ITC's determination was reasonable, supported by substantial evidence on the record and otherwise in accordance with law.

Babcock & Wilcox:

Plaintiffs contend that the ITC had an obligation to examine the reasons why Babcock & Wilcox left the seamless stainless steel pipe and tube business in 1985 and to do one of the following: exclude the data, place the impact of the data in the context of the investigation or not accord undue weight to the data. In prehearing briefs, plaintiffs asserted that the departure of Babcock & Wilcox was due to several factors including: the disappearance of new construction in the power and petroleum industries, the company's decision not to update its technology, the loss of inhouse construction projects and lack of experience in small-lot orders. ITC Record Document (hereinafter ITC R.) 84 at 25–26 and Exhibit A at 15–16, 23–24, 59–60.

Defendant ITC correctly points out that the ITC may only exclude data from a member of the domestic industry if that member is a related party within the meaning of 19 U.S.C. § 1677(4)(B) (1982) and the ITC has determined that "appropriate circumstances" existed to exclude the data. Since Babcock & Wilcox do not meet this criteria, its data can not be excluded.

In addition, there is no basis for a firm by firm analysis of the condition of the domestic industry as requested by plaintiffs. As the Court noted in *Copperweld Corp.* v. *United States:*

> Section 1673d(b)(1) requires that the ITC make and publish a final determination of whether a "domestic industry" is materially injured by reason of the subject imports. The domestic industry is further defined as "the domestic producers *as a whole* of the like product * * *." 19 U.S.C.A. § 1677(4)(A) * * *. This language makes manifestly clear that Congress intended the ITC determine whether or not the domestic industry (as a whole) has experienced material injury due to the imports. This language defies the suggestion that the ITC must make a disaggregated analysis of material injury.

12 CIT ——, 682 F. Supp. 552, 569 (1988) (emphasis in original).

In response to a similar claim that the ITC acted contrary to law because it accepted aggregated data when the petitioner had offered testimony to indicate injury to a major portion of a United States industry, the Court in *National Ass'n of Mirror Mfrs.* v. *United States* held that the ITC acted in accordance with law in considering the industry as a whole where no allegation of regional industry was made under 19 U.S.C. § 1677(4)(C) (1982). 12 CIT ——, 696 F. Supp. 642, 647–48 (1988).

This Court finds that the ITC's treatment of the Babcock & Wilcox data was reasonable, supported by substantial evidence on the record and otherwise in accordance with law.

Indicators of Material Injury:

Plaintiffs contend that the ITC failed to correctly analyze the data gathered concerning the indicators of material injury. According to the final determination, the ITC considered domestic consumption, United States production, capacity, capacity utilization, shipments, inventories, employment and profitability, among other factors, in determining the condition of the domestic industry. USITC Pub. No. 2033 at 10.

Plaintiffs contend that the domestic industry did not suffer sharp declines in capacity, production, shipments, employment or net sales and that the industry did not have "generally low profitability" over the period of investigation. However, the data compiled by the ITC suggest otherwise. Capacity by integrated producers declined from 21,300 short tons to 15,300 short tons between 1984 and 1986. *Id.* at 11. Production by integrated producers decreased by 11 per cent from 1984 to 1986. *Id.* Domestic shipments by integrated producers, measured by both quantity and value fell, from 8,010 short tons valued at $67.4 million in 1984 to 6,681 short tons valued at $60.2 million in 1986. *Id.* at 12. The average number of workers engaged in production of seamless stainless steel pipe fell from 407 in 1984 to 234 in 1986. *Id.* at 12, A–28. Net sales of seamless stainless steel pipe and tube declined steadily during the investigative period. *Id.* at 13. There was an increase in profitability in 1986 that was partially attributable to Babcock & Wilcox leaving the industry. *Id.*

This Court holds that the ITC's determination that the domestic seamless stainless steel pipe and tube industry suffered material injury was reasonable, supported by substantial evidence on the record and otherwise in accordance with law.

Redrawers:

The ITC identified the domestic industry producing seamless stainless steel pipe and tube as (1) integraed companies that melt stainless steel, prdouce the basic shapes and then make pipe or tube, and (2) redrawers, that purchase the shapes and bring the products to final form. *Id.* at 8. Plaintiffs claim that the ITC reached its injury determination without regard to the condition of

the redrawers. Defendant ITC points out that redrawer information was included in the determination. For example, footnotes 32–34 to page 11 of the determination specifically identify production by redrawers which increased from 1984 to 1986, but decreased in interim (January–June) 1987 (compared with interim 1986), and redrawers' capacity which increased from 1984 to 1985, dropped in 1986 and declined in the first six months of 1987.

Defendant ITC notes that most of the data for the redrawers were analyzed separately from the data of the integrated producers in order to avoid double counting of the finished product. *Id.* at 11, n.32. In situations where further processing of an item is involved, the practice of the ITC is to examine the data for the two groups separately. *See, e.g. Butt-Weld Pipe Fittings From Brazil and Taiwan,* USITC Pub. No. 1918 at A–10–11 (1986); *Certain Seamless Steel Pipes and Tubes From Japan,* USITC Pub. No. 1347 at A–14 (1983).

This Court holds that the ITC's analysis of redrawer data was reasonable, supported by substantial evidence on the record and otherwise in accordance with law.

Exclusion of Sandvik Steel Company as a Related Party:

Plaintiffs contend that Sandvik Steel Company, a domestic producer of seamless stainless steel pipes and tubes that is wholly owned by Sandvik AB, was erroneously excluded from the domestic industry for the purposes of the ITC's injury analysis on the ground that it was a related party.

The exclusion provision reads as follows:

> (B) Related parties
>
> When some producers are related to the exporters or importers, or are themselves importers of the allegedly subsidized or dumped merchandise, the term "industry" may be applied in appropriate circumstances by excluding such producers from those included in that industry.

19 U.S.C. § 1677(4)(B).

Plaintiffs contend that circumstances do not exist to exclude Sandvik Steel Company as a related party for the following reasons: (1) Sandvik Steel Company can buy redraw hollows from other sources at lower or comparable prices than those offered by its parent company, Sandvik AB; (2) Sandvik Steel Company imports from its parent company primarily to obtain sizes and grades which are unavailable from other sources; and (3) Sandvik Steel Company's profitability is attributable to its state-of-the-art cold-working facility, extensive investment in research and development and a large and specialized sales force.

The ITC explained its determination as follows:

> In this final investigation, the Commission obtained information confirming that Sandvik [Steel Company] is the exclusive U.S. importer of products from its parent company, thus indicating that the latter may be directing its exports to the United

> States so as not to compete with its related U.S. producer. In addition, Sandvik [Steel Company] appears to have benefited from the consistently lower prices of Swedish imported products relative to domestic products. Therefore, applying section 771(4)(B) [19 U.S.C. § 1677 (4) (B)], we determine that Sandvik [Steel Company]should be excluded from the domestic industry.

USITC Pub. No. 2033 at 10 (footnotes omitted).

Plaintiffs specifically argue that the data used to support the ITC's statement that Sandvik Steel Company appeared to have benefited from consistently lower prices of Swedish imports concerned welded, not seamless pipe and tube. Defendant ITC correctly points out that the ITC inadvertently quoted material from a paragraph prior to the one beginning on the page cited specifically in the footnote. This earlier paragraph did refer to welded products. However, the ITC's citation to pages A-33 and A-72 of the information obtained in the investigation did cite correctly the data to support the ITC's statement. *Id.* at A-33, A-72.

Plaintiffs further argue that the ITC did not follow its own factors as set out in previous investigations in order to determine whether "appropriate circumstances" exist to exclude a related party. These factors are "(1) the percentage of domestic production attributable to the related producers; (2) whether related producers chose to import the product under investigation in order to benefit from the unfair market; and (3) the competitive position of the related domestic producer vis-a-vis other domestic producers." *Id.* at 9, n.23. Plaintiffs claim that the ITC did not make findings as to factors one and two.

The ITC, in its determination, noted a reference in the legislative history to the related parties provision. The Legislative History of the Trade Agreements Act of 1979 provides as follows:

> Thus, for example, where a U.S. producer is related to a foreign exporter and the foreign exporter directs his exports to the United States so as not to compete with his related U.S. producer, this should be a case where the ITC would not consider the related U.S. producer to be a part of the domestic industry.

S. Rep. No. 249, 96th Cong., 1st Sess. 83, *reprinted in* 1979 U.S. Code Cong. & Admin. News 381, 469.

The above example is the exact scenario of the instant case. Moreover, factor two above would appear to apply to this situation.

Plaintiffs also contend that the ITC should have made findings as to the three factors. The ITC is not required to make such findings and noted in its determination that these three factors were among others it had focused upon in previous investigations. USITC Pub. No. 2033 at 9, n.23.

This Court holds that the determination by the ITC to exclude Sandvik Steel Company from the domestic industry as a related party was reasonable, supported by substantial evidence on the record and in accordance with law.

Material Injury Caused By Less Than Fair Value Imports From Sweden

In making its determination that the domestic industry was materially injured by reasons of less than fair value imports from Sweden, the ITC considered the volume of imports, the effect of imports on prices in the United States for the like product, and the impact of such imports on the relevant domestic industry, among other factors in accordance with 19 U.S.C. § 1677(7)(B) (1982). The ITC found that

> the significant volume of seamless pipe and tube from Sweden and the high import penetration throughout the period of investigation, combined with the pattern of underselling of these imports and the revenue lost to the domestic industry, demonstrate that these LTFV imports have caused material injury to the domestic industry.

USITC Pub. No. 2033 at 15.

Plaintiffs contend that the ITC's analysis was erroneous for the following reasons: (1) the ITC failed to exclude non-competing imports from its analysis of both import volume and import penetration; (2) the ITC failed to provide substantial analysis for its conclusion that plaintiffs' import volumes and market penetration were "significant"; (3) the ITC ignored evidence in concluding that plaintiffs consistently undersold domestic producers; and (4) there was no substantial evidence of lost sales or lost revenue.

Import Volume and Import Penetration:

Plaintiffs claim that significant volumes of their imports did not compete the domestic products and therefore should have been excluded from the analysis of import volume and import penetration. Defendant ITC argues that the ITC is directed by statute to examine injury to the domestic industry producing the like product, most specifically "the volume of imports of the merchandise which is the subject of the investigation." 19 U.S.C. § 1677(7)(B)(i). Since plaintiffs' merchandise was not excluded from the like product definition, defendant ITC claims this merchandise can not be excluded from the analysis of import volume and import penetration.

This Court agrees that the ITC does not have the authority to exclude merchandise from the like product designation. *See Sprague Electric Co.* v. *United States,* 84 Cust. Ct. 260, 261–62, C.R.D. 80–6 (1980) (the "Commission has no authority to refine or modify the class or kind of merchandise found to be, or likely to be, sold at [less than fair value]"). The ITA controls the scope of the investigation, while the ITC determines whether there is material injury or the threat of material injury to the domestic industry producing the like product. 19 U.S.C. §§ 1673, 1673(a), 1673d. This Court holds that the ITC's determination to include all of the Swedish imports in its analysis of import values was reasonable, supported by substantial evidence on the record and in accordance with law.

Plaintiffs further contend that the ITC only recited the import volumes and market shares when it had a duty to analyze the data to show the impact which the imports had on the domestic industry. Plaintiffs claim that the ITC's recitation of the figures was a defective analysis under the substantial evidence test as discussed in *USX Corp.* v. *United States,* 11 CIT ——, 655 F. Supp. 487 (1987). Plaintiffs contend that this faulty analysis did not prove that the subject imports were "significant" as required by 19 U.S.C. § 1677(7)(C)(i).

Defendant ITC argues that the figures were analyzed and showed a record level of imports in 1984 (60 per cent higher than the previous year) and an import penetration level of 20.4 per cent in 1984, 15 per cent in 1985 and 17.9 per cent in 1986. USITC Pub. No. 2033 at 13–14, A–52, A–56. Import volume declined .5 per cent from interim 1986 to interim 1987 which the ITC attributed, at least in part, to the instant investigation. *Id.* at 14.

In *USX,* a challenge to a final negative antidumping duty determination, the Court found the ITC's analysis did not meet the substantial evidence test because although the ITC stated that levels of market penetration remained low and stable, the Commission failed to discuss the significance of this trend or its relationship to the other facts resulting from the investigation. *USX,* 11 CIT at ——, 655 F. Supp. at 490. Defendant notes that the instant investigation revealed (along with the import penetration of 15 to 20 per cent) a consistent pattern of underselling, declining prices in the United States market and lost revenues. USITC Pub. No. 2033 at 15. Defendant also distinguishes the instant case from *USX* by noting that the instant case concerns import penetration of 15 to 20 per cent, while *USX* involved import penetration of approximately only one per cent. *Id.* at 489.

This Court agrees that in the instant case, the ITC did not rely on one single factor or "isolated tidbits of data which suggest a result contrary to the clear weight of the evidence" as the Court found in *USX. Id.* This Court holds that the ITC's analysis of the impact which import volumes and market shares had on the domestic industry indicated that the volume was significant and that this analysis was reasonable, supported by substantial evidence on the record and otherwise in accordance with law.

Underselling of Domestic Producers:

Plaintiffs claim that the ITC relied on seven isolated instances of underselling while ignoring pricing data for products which did not show consistent underselling. These seven instances occurred when lower-priced Sandvik mechanical tubing was purchased instead of a competing domestic product and the purchasers gave plaintiffs' lower prices as one reason, but in most cases not the only reason, for selecting plaintiffs' product. In addition, plaintiffs state that they sometimes undersell domestic products in order to offset the disad-

vantage they face because of the longer lead time necessitated by shipping from Sweden.

Plaintiffs contend further that there were significant instances of overselling by Sandvik throughout the period of investigation for both hot and cold rolled pipe. Plaintiffs claim that in reality, the investigation revealed a pattern of selling and underselling which the ITC has found in the past not to meet the statutory standard of significant price undercutting. *See Copperweld Corp.*, 12 CIT at ——, 682 F. Supp. at 566.

Defendant ITC and defendant-intervenors cite as evidence of underselling: (1) data on bids for seamless SSHPs; (2) information in purchasers' questionnaires and information on lost sales; and (3) quarterly price comparisons.

The data on bids show that seven of the eleven orders of seamless SSHPs were awarded to plaintiffs and that the price of these seven orders was from eight to fifteen per cent below the quoted domestic price. USITC Pub. No. 2033 at 14–15. Plaintiffs claim the data were not supported by substantial evidence because the products were not representative of the range of products made by them, the purchasers were not representative of all domestic purchasers and only the two largest bids were included in the data. Defendant ITC contends that its record demonstrates that it sought pricing data on a wide range of products, purchasers and imported shipments. ITC C. 17 at A–90. Defendant ITC further notes that it is not required to meet "some ambiguous level of scientific reliability" in compiling its record. *Alberta Pork Producers' Mktg. Bd.* v. *United States*, 11 CIT ——, 669 F. Supp. 445, 463 (1987).

The purchasing questionnaires and lost sales information indicate that plaintiffs' lower prices was an important factor in purchasers' selections. USITC Pub. No. 2033 at A–71–72, A–80–81. Quarterly price comparisons during January 1984 to June 1987 show that "prices of seamless products 2 and 3 (mechanical tubing) * * * generally fell, prices for seamless product 1 (pipe) and seamless product 4 (redraw hollows) initially increased before declining * * *." USITC Pub. No. 2033 at A–65. Plaintiffs contend that pricing information was not based upon representative sales of Sandvik products in the United States although price comparisons were made with specific products.

The Court notes that the ITC is within its discretion in making a reasonable interpretation of the facts it uncovers in an investigation. *Copperweld*, 682 F. Supp. at 577; *Mirror Mfrs.*, 12 CIT at ——, 696 F. Supp. at 648. This Court holds that the ITC's interpretation of data regarding the underselling of seamless SSHPs was reasonable, supported by substantial evidence on the record and otherwise in accordance with law.

Lost Sales or Lost Revenue:

Plaintiffs claim the ITC is unable to confirm any instances of lost sales attributable to lower priced Sandvik products. Defendant-intervenors contend that the bid information noted *supra* was evidence of head-to-head competition between plaintiffs and the domestic industry thus demonstrating lost sales. There was also an unconfirmed allegation of lost sales along with an indication of increased purchases from Sweden. USITC Pub. No. 2033 at A–80.

The ITC verified a specific instance of lost revenue where United States producers cut their prices to compete with the subject merchandise. *Id.* at A–82. In addition, certain purchasers stated that domestic producers had to lower the price of their merchandise to compete with the delivered prices of Swedish pipe and tube. *Id.* at A–80, A–82–83.

This Court holds that the ITC's interpretation of data regarding lost sales or lost revenues was reasonable, supported by substantial evidence on the record and otherwise in accordance with law.

DETERMINATION OF ITA OF SALES AT LESS THAN FAIR VALUE

Plaintiffs contend that the ITA made the following errors when determining that SSHPs from Sweden were made at less than fair value: (1) the ITA erroneously deducted from its calculation of the United States Price in exporter's sales price transactions, part of the profit which Sandvik Steel Company made on its domestic sales of products which it further processed; (2) the ITA failed to match comparable quantities of merchandise sold in the United States and in the home market (or third country). Where such matches could not be made, the ITA failed to make any adjustment for the effect of quantity on price despite plaintiffs' demonstration of the relationship between quantity and price; and (3) the ITA erroneously calculated the United States price on the basis of sales which plaintiffs made to an unrelated reseller located in a third country. The Court will examine each of these issues in order to determine whether the ITA's determination was reasonable, supported by substantial evidence on the record and otherwise in accordance with law.

Profit Deducted from United States Price:

Plaintiffs object to the ITA deducting from the calculation of the United States price part of the profit which Sandvik Steel Company made on its domestic sales of products which were further processed. Plaintiffs argue that deduction of the profit is not consistent with prior ITA practice and therefore should be explained and that the dumping margin would not be eliminated even if plaintiffs were to increase their United States price by the amount of dumping. The ITA stated in its final determination:

> For the exporter's sales price sales involving further manufacturing, we deducted all value added in the United States. This value consisted of all costs associated with the manufacture and sale of the finished pipe or tube, and a proportional amount of the profit or loss related to these costs. Profit or loss was calculated by deducting from the sales price of the finished pipe or tube all costs incurred in Sweden and the U.S. by the company for the production and sale of the product. The profit or loss was then apportioned between the costs of the redraw hollows and additional costs incurred in the U.S. based on the ratio of these costs to total costs.

52 Fed. Reg. at 37,811.

In Comment 7 to the final determination the ITA explained further:

> We calculated the profit/loss of the SSHP finished and sold by Sandvik Steel Company in the U.S. and allocated this profit/loss, based on the cost of production, to the redraw hollow entering the U.S. and the additional costs incurred in the U.S. To consider profit/loss to be outside the definition of "value added" would be contrary to agency policy (See *Erasable Programmable Read Only Memories* (EPROMS) from Japan (51 FR 39680, Oct. 30, 1986). While it is not the Department's practice to deduct an element for profit attributable to the related reseller in circumstances where ESP [exporter's sales price] sales do not involve additional manufacturing in the U.S., the statute does not preclude us from considering profit to be part of value added when additional manufacturing or assembly is performed.

52 Fed. Reg. at 37,813.

The statute referred to above is 19 U.S.C. § 1677a(e)(3) which reads as follows:

> (e) Additional adjustments to exporter's sales price
> For purposes of this section, the exporter's sales price shall also be adjusted by being reduced by the amount, if any, of—
>
> * * * * * * *
>
> (3) *any* increased value, *including* additional material and labor, resulting from a process of manufacture or assembly performed on the imported merchandise after the importation of the merchandise and before its sale to a person who is not the exporter of the merchandise.

19 U.S.C. § 1677a(e)(3) (1982) (emphasis added).

Along the same lines, 19 C.F.R. § 353.10(e)(3) states:

> (e) *Additional adjustments to exporter's sales price.* For purposes of this section, the exporter's sales price shall also be adjusted by being reduced by the amount, if any, of—
>
> * * * * * * *
>
> (3) Any increased value resulting from a process of manufacture or assembly performed on the imported merchandise after the importation of the merchandise and before its sale to a per-

> son who is not the exporter of the merchandise, which value *generally* will be determined from the costs of material, labor and other expenses incurred in such manufacture or assembly.

19 C.F.R. § 353.10(e)(3) (1986) (emphasis added).

The Court recently addressed the issue of deduction of profit in *Sonco Steel Tube Div., Ferrum Inc.* v. *United States,* 12 CIT ——, 694 F. Supp. 959 (1988). In *Sonco,* the Court upheld the ITA's profit deduction, finding that "[t]he plain words of the statute and regulation neither expressly prohibit nor require ITA to consider profit as an element of value added." *Sonco,* 12 CIT at ——, 694 F. Supp. at 966. The Court found "no reason to dispute ITA's statement * * * that its treatment of profit associated with value added in the United States was 'based on the Department's current methodology at the time of the final determination * * *.'" *Id.* at 967.

As the ITA noted in its determination in the instant case, it has been their practice to deduct profit. 52 Fed. Reg. at 37,813. As an example of this practice, the ITA cited *Erasable Programmable Read Only Memories (EPROMS) From Japan; Final Determination of Sales at Less Than Fair Value,* 51 Fed. Reg. 39,680 (Oct. 30, 1986), where "the cost of further processing in the United States, including an amount for profit or loss associated with that processing, was * * * deducted." 51 Fed. Reg. at 39,681.

In its Study of Antidumping Adjustments Methodology and Recommendations for Statutory Change (Nov. 1985) (hereinafter Adjustment Study) the ITA stated that "the purpose of ESP adjustments for value added is to enable ITA to arrive at 'the determination of the appropriate ESP for the merchandise in its condition at the time of importation.'" *Sonco,* 12 CIT ——, 694 F. Supp. at 967 (citing Adjustment Study at 34–35). The Adjustment Study also cited *Cellular Mobile Telephones and Subassemblies from Japan,* 50 Fed. Reg. 45,447 (Oct. 31, 1985), where the exporter's sales price of selected subassemblies was based on the selling price of the finished telephones with deductions for value added, including general expenses and profit. *Id.* (citing Adjustment Study at 35).

Plaintiffs contend that the ITA had changed its administrative practice beginning with *Cellular Mobile Telephones from Japan,* followed by the Adjustment Study and that this Court should consider whether the ITA's reversal required an explanation of the reasons for that reversal. This particular issue was already decided in *Sonco* where the Court stated:

> Although ITA did reject a specific proposed regulation regarding ESP value added adjustments for profit, it acknowledged the existence of a policy permitting some adjustments, and announced its desire to gain further experience with such adjustments before adopting any specific proposals. While formal rulemaking procedures might be required before the ITA could adopt the specific type of rule which the ITA rejected in

1980, it is not precluded from construing the statute to cover profit as a factor in value added and making ESP adjustments.

12 CIT at ——, 694 F. Supp. at 966–67 (footnotes omitted).[2]

Plaintiffs further contend that the ITA's methodology of deducting profit makes it impossible for an exporter with substantial manufacturing in the United States to eliminate dumping by raising its sales price in the United States by an amount exactly equal to the calculated amount of the dumping. Plaintiffs claim that this price equalization can not take place since as the United States price is increased, the percentage of the profit deduction also increases, creating a residual dumping margin. In support of their theory, plaintiffs cite *Ansaldo Componenti S.p.A.* v. *United States,* 10 CIT 28, 35, 628 F. Supp. 198, 204 (1986) where the Court stated: "Under 19 U.S.C. § 1673, if the price for goods in the United States is less than the foreign market value of the goods, the difference between the two is the margin of dumping in the United States and antidumping duties must be paid to offset it."

In *Ansaldo,* the Court simply noted that the margin of dumping is the difference between the foreign market value and the United States price. Defendant-intervenors point out that the ITA's approach to profit deduction is virtually identical to its approach to a variety of other adjustments, such as the adjustment to the United States price for expenses such as tariff duties, commissions, advertising or brokerage and handling fees. Memorandum of Defendant-Intervenors in Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record at 86.

This Court holds that the ITA's determination to deduct profit from the calculation of the United States price was reasonable, supported by substantial evidence on the record and in accordance with law.

Matching Comparable Quantities and Quantity Discount Adjustment:

Plaintiffs contend that the ITA failed to match comparable quantities of merchandise sold in the United States with those sold in Sweden and West Germany. They claim the appropriate quantity distinction should be sales above and below 100 kilograms.

Defendant ITA contends that plaintiffs have confused the adjustment for comparable quantities with the quantity discount adjustment. Defendant ITA claims that plaintiffs never requested ITA to match comparable quantities and that plaintiffs do not qualify for the quantity discount adjustment.

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[2]The rule which the ITA rejected in 1980 read in pertinent part:

> If the value of the merchandise as imported into the United States is less than 80 percent of the price at which the merchandise is sold or agreed to be sold in the United States to a party unrelated to the exporter, such increased value shall also include an appropriate allocation of profit to such material or labor used or services performed after importation as was not included in the value of the merchandise imported.

44 Fed. Reg. 59,742, 59,749 (Oct. 16, 1979).

The statute outlining an allowance for differences in quantities sold is section 773(a)(4)(A) of the Tariff Act of 1930, as amended, which states in pertinent part:

> (4) Other adjustments
>
> In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value (or that the fact that the United States price is the same as the foreign market value) is wholly or partly due to—
>
> > (A) the fact that the commercial quantities, in which such or similar merchandise is sold or, in the absence of sales, offered for sale, for exportation to, or in the principal markets of, the United States, as appropriate, in the ordinary course of trade, are less or are greater than the commercial quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale, in the principal markets of the country of exportation in the ordinary course of trade for home consumption * * *.
> >
> > * * * * * * *
> >
> > then due allowance shall be made therefor.

19 U.S.C. § 1677b(a)(4)(A) (1982 & Supp. V 1987).

"Due allowance" may be made according to 19 C.F.R. § 353.14 (1986) which reads as follows:

> **§ 353.14 Differences in quantities.**
>
> (a) *In general.* In comparing the United States price with such applicable criteria as sales or offers, on which a determination of foreign market value is to be based, comparisons normally will be made on sales of comparable quantities of the merchandise under consideration. *Further, reasonable allowances will be made for differences in quantities, to the extent that it is established to the satisfaction of the Secretary that the amount of any price differential is wholly or partly due to such differences in the quantities sold.* In determining allowances for differences in quantity, consideration will be given, among other things, to the practice of the industry in the country of exportation with respect to affording in the home market (or third country markets, where sales to third countries are the basis for comparison) discounts for quantity sales which are available to those who purchase in the ordinary course of trade.
>
> (b) *Criteria for allowances.* Allowances for price discounts based on quantitative differences in sales ordinarily will not be made unless:
>
> (1) *Six month rule.* The exporter during the period covered by the antidumping investigation as established under § 353.38 (or during such other period as investigation shows is more representative) had been granting quantity discounts of at least the same magnitude with respect to 20 percent or more of such or similar merchandise sold in the home market (or in third coun-

try markets when sales to third countries are the basis for comparison) in the ordinary course of trade; or

(2) *Cost justification.* The exporter can demonstrate that the discounts are warranted on the basis of savings which are specifically attributable to the production of the different quantities involved.

(3) *Use in determining foreign market value.* If the exporter satisfies the conditions in paragraph (b) of this section the price of such or similar merchandise sold at a discount in the home market (or in third country markets when third countries are the basis for comparison) will ordinarily be used as the basis for determining the foreign market value of merchandise for comparison with comparable quantities sold in the United States. If the exporter does not satisfy the conditions in paragraph (b) of this section, any sales of such or similar merchandise in the home market (or in third country markets when third countries are the basis for comparison) which are made at a discount will be used in calculating a weighted average in accordance with § 353.20.

(c) *Price lists.* In determining whether a discount has been given, the existence of a published price list reflecting such a discount will not be controlling. A price list ordinarily will be accepted only if, in the line of trade and market under consideration, the exporter demonstrates that it has adhered to its price list.

19 C.F.R. § 353.14 (1986).

Plaintiffs claim they are entitled to an adjustment to reflect a quantity discount for sales of different quantities in the United States and in Sweden or the United States and a third country market in those cases where sales of comparable quantities did not occur in both markets.

In order to qualify for a quantity discount adjustment, plaintiffs must show price/quantity correlation. In a recent determination the ITA commented as follows:

> In our view,the controlling requirement of § 353.14 is that, to be eligible for a quantity-based adjustment, a respondent must demonstrate a clear and direct correlation between price differences and quantities sold or costs incurred. This requirement applies equally to an allowance for quantity differences under the six month rule (§ 353.14(b)(1)) or the cost justification requirement (§ 353.14(b)(2)).

Final Determination of Sales at Less Than Fair Value: Brass Sheet and Strip From the Netherlands, 53 Fed. Reg. 23,431, 23,433 (June 22, 1988).

Defendant ITA contends that plaintiffs did not establish to its satisfaction that plaintiffs adhered to a quantity discount schedule in its negotiated prices. Defendant ITA claims that while quantity may have had some impact upon price, there were other factors which also influenced the negotiated price. It was also noted by defendant ITA that plaintiffs' officials in Germany stated that "no

fixed quantity discount policy was in effect during the [period of investigation]." ITA R. 162 at 11. Plaintiffs also failed to establish that the discount was a function of the quantities sold. In Comment 10 to the final determination, the ITA explained:

> We have reviewed the respondents [sic] pricing practices and determined that no clear correlation between prices and quantities has been demonstrated. While internal price lists (which include quantity related prices) are used in setting prices, it is impossible to measure their final impact on the negotiated prices. Furthermore, no cost justification has been provided. Therefore, the claim has been denied.

52 Fed. Reg. at 37,814.

This Court finds that the ITA properly exercised its discretion in determining that plaintiffs do not qualify for a quantity discount adjustment since the record reflects that there is a lack of correlation between price and quantity. The Court holds that the ITA's determination not to make an adjustment for quantity discount was reasonable, supported by substantial evidence on the record and in accordance with law.[3]

Sales to Middleman in a Third Country:

Plaintiffs contend that the ITA erroneously calculated the United States price on the basis of SSHP sales to an unrelated middleman located in a third country rather than on the basis of the middleman's sales to the United States. According to the sales agreement between plaintiffs and the middleman, the middleman would have the right to distribute plaintiffs' merchandise in the United States, the middleman would use best efforts to promote, market, sell and/or distribute the product in the United States and Sandvik would purchase the entire unsold inventory at current list price at the end of the agreement. Plaintiffs claim they had no control over the merchandise after it was sold to the middleman.

Plaintiffs contend that their sales to the middleman should not be considered as sales to the United States for which a dumping margin should be calculated for the following reasons: (1) the statutory criteria authorizing use of the price to a middleman has not been met; (2) the use of the plaintiffs-middleman price for merchandise likely to remain in inventory would result in comparing foreign market values based on Swedish sales which are not contemporaneous with sales to the United States; and (3) the middleman's sales of merchandise to unrelated purchasers in the United States falls within the definition of United States price in the Tariff and Trade Act of 1984.

[3] Plaintiffs appear to be making an argument that they are entitled to a separate adjustment for matching comparable quantities in addition to the quantity discount adjustment outlined in 19 C.F.R. § 353.14(b). Section (a) of the regulation sets down the general instructions for the ITA to compare the usual quantities sold in the United States market with the usual quantities sold in the foreign market. Section (b) entitled "Criteria for allowances," sets out the requirements to be met in order to qualify for the quantity discount. Since plaintiffs did not meet the requirements of section (b), they did not receive a quantity discount.

According to 19 U.S.C § 1677a(b) purchase price is "the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from a reseller or the manufacturer or producer of the merchandise for exportation to the United States." 19 U.S.C. § 1677a(b) (1982 & Supp. V 1987). Legislative history indicates that the above definition of purchase price was modified

> to provide statutory authority for the present administrative practice whereby *if a producer knew that the merchandise was intended for sale to an unrelated purchaser in the United States under terms of sale fixed on or before the date of importation, the producer's sale price to an unrelated middleman will be used as the purchase price.* Thus, the dicta in *Voss International* v. *United States,* C.D. 4801, (May 7, 1979) is explicitly overruled, and "purchase price" may be used if transactions between related parties indicate that the merchandise has been sold prior to importation to a U.S. buyer unrelated to the producer. The Committee understands that the executive branch intends to issue regulations, consistent with present practice, under which sales from the foreign producer to middlemen and any sales between middlemen before sale to the first unrelated U.S. purchaser are examined to avoid below cost sales by the middlemen.

H.R. Rep. No. 317, 96th Cong., 1st Sess. 75 (1979) (emphasis added).

Plaintiffs contend that although they knew that the merchandise was intended for sale to an unrelated purchaser in the United States, the terms of sale between the middleman and its customers were not "fixed on or before the date of importation." Plaintiffs contend that they did not control the terms and condition of resale and had no knowledge of the terms of sale between the middleman and its United States customers. Plaintiffs' lack of knowledge included ignorance as to whether or not the terms of sale were fixed on or before the date of importation.

Defendant ITA contends that it is accepted policy for the Department to use the sales price between the manufacturer and the middleman as the United States price. The ITA cites to Pattison's treatise on antidumping law which states:

> Perhaps one of the most common questions raised in this regard involves a foreign producer and an unrelated foreign trading company which sells the producer's goods through a U.S. subsidiary trading or marketing company to an unrelated U.S. purchaser. *The Department of Commerce will generally use the sale price between the manufacturer and the independent foreign trading company as the basis for United States Price. So long as that purchase is consummated prior to importation and the manufacturer knows the merchandise is being sold in the United States, that sale price will satisfy the purchase price standards and can be used for the United States price.*

3 J. Pattison, *Antidumping and Countervailing Duty Laws* § 5.04 at 5–19 (1988) (emphasis added, footnote omitted).

In addition, the ITA's Adjustment Study states:

> Purchase price is the price at which the exported merchandise is purchased by the first unrelated buyer when the sale occurs prior to importation into the United States. This usually is the price at which a foreign producer sells merchandise to an unrelated U.S. importer, or to a foreign trading company for export to the U.S.

Adjustment Study at 4.

The fact that plaintiffs have no knowledge as to whether or not the terms of sale between the middleman and its United States customers were fixed on or before the date of importation to the United States has no bearing on whether or not those terms were actually fixed. Plaintiffs provide no evidence to contradict that the terms were fixed. Plaintiffs are grasping on to one phrase in the legislative history in order to oppose a practice that the ITA has followed in its discretion.

This Court holds that the ITA's determination that the statutory requirements for using the middleman's price were met was reasonable, supported by substantial evidence on the record and otherwise in accordance with law.

Foreign Market Value:

Plaintiffs introduce foreign market value restrictions into the discussion of the determination of the United States price. Plaintiffs state that foreign market value and United States price must be compared as of the date the merchandise is sold in the United States and since plaintiffs' merchandise is likely to be in inventory, there will not be a contemporaneous comparison.

The United States price in this case is the purchase price which is defined as "the price at which the merchandise is purchased, or agreed to be purchased, prior to the date of importation, from a reseller or the manufacturer or producer of the merchandise for exportation to the United States." 19 U.S.C. § 1677a(b). The sales by plaintiffs to the middleman are not exporter's sales price transactions since these sales were made before the merchandise was imported into the United States and the middleman was an unrelated importer. 19 U.S.C. § 1677a(c).

The requirement that foreign market value prices must be the price as of the date of actual entry of the merchandise into the United States applies to exporter's sales price transactions. The statute refers to the determination of foreign market value regarding sales by the "person for whom (or for whose account) the merchandise is imported to any other person who is not described in subsection (e)(3) of this section * * *." 19 U.S.C. § 1677b(a)(1) (1982 & Supp. V 1987). Subsection (e)(3) defines related parties. 19 U.S.C. § 1677b(e)(3) (1982). This restriction applies to the price charged by the United States importer to the first unrelated United States purchaser, which would be the exporter's sales price.

This Court holds that the ITA's determination of the United States Price was reasonable, supported by substantial evidence on the record and otherwise in accordance with law.

Reseller:

Plaintiffs argue that the middleman qualifies as a reseller under the amended definition of United States price in the Trade and Tariff Act of 1984. Therefore, plaintiffs contend that the price charged by the middleman, not the price which plaintiffs charged to the middleman should comprise the United States price.

Defendant ITA points out that Commerce has interpreted the term reseller in 19 U.S.C. § 1677a(b) to mean a foreign exporter who resells as opposed to one who merely ships the merchandise, and one whose sales are used to calculate the foreign market value. Defendant ITA cites to Proposed Rule and Request for Comments 19 C.F.R. Part 353 where the Department stated:

> Paragraph(s) of the proposed rule defines for the first time the word "reseller." The definition is consistent with section 614 of the 1984 Act. Use of the word "reseller" rather than "exporter" in the proposed rule focuses attention on selling activity, which is important in calculating foreign market value, rather than on shipping activity, which is not.

51 Fed. Reg. 29,046, 29,047 (Aug. 13, 1986).

Legislative history indicates that the statue was amended "so a reseller's price *may* serve as purchase price if it is prior to the date of importation and the merchandise is for exportation to the United States." H. Conf. Rep. No. 1156, 98th Cong., 2d Sess., 185 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 5,220, 5,302 (emphasis added).

The ITA explained its decision regarding the inclusion of these sales within the calculation of the United States price in its response to Comment 8 of the final determination:

> We normally treat sales by a respondent to an unrelated purchaser as sales to the United States where the seller knows that the merchandise is being sold for export to the United States. This is true of sales to trading companies in the country of origin or those in third country locations. *Urea from the USSR* (52 FR 19560, May 26, 1987, *Fuel Ethanol from Brazil* (51 FR 5573, February 14, 1986). Therefore, since Sandvik knew that the merchandise was being sold to the U.S., we included these sales in our analysis.

52 Fed. Reg. at 37,813.

This Court holds that the ITA acted within its discretion in using the price paid by plaintiffs to the middlemen as the United States price and that this determination was reasonable, supported by substantial evidence on the record and otherwise in accordance with law.

CONCLUSION

The Court holds that based on the aforementioned reasons, the determinations by the ITC and the ITA were reasonable, supported by substantial evidence on the record and otherwise in accordance with law. Accordingly, the determinations are affirmed, plaintiffs' motion for judgment upon the agency record is denied and this action is dismissed.

(Slip Op. 89–132)

LILLIAN COHEN, PLAINTIFF *v.* U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 89–05–00277

OPINION

[Defendant's motion to dismiss action granted.]

(Decided September 14, 1989)

Lillian Cohen, pro se.

Stuart E. Schiffer, Acting Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis*) for the defendant.

AQUILINO, *Judge:* The plaintiff seeks judicial review of defendant's April 24, 1989 negative determination regarding eligibility to apply for worker adjustment assistance on the part of former employee(s) of North American Underwear, Inc. U.S. Department of Labor Employment and Training Administration file TA-W-22,640. The defendant has interposed a motion to dismiss this action for failure to state a claim upon which relief can be granted.

The Trade Act of 1974, as amended, provides that a

> petition for a certification of eligibility to apply for adjustment assistance * * * may be filed with the Secretary of Labor * * * by a group of workers * * * or by their certified or recognized union or other duly authorized representative.

19 U.S.C. § 2271(a). In conformity with this statute, the form Petition for Trade Adjustment Assistance submitted to the Department bore spaces for the names, addresses, telephone numbers and dates of separation of three persons. A printed instruction on the form stated:

> Who may file a petition—A petition may be filed by a group of three or more workers in a firm, or a subdivision thereof, or by their union or other duly authorized representative. The workers on whose behalf a petition is filed must be, or have been, employed regularly at the firm or subdivision identified in the

> petition. The workers' employment must be, or have been, related to the production of articles described in the petition.[1]

The petition herein was executed solely in the name of the plaintiff. The record contains a letter stating that, since she was a "Production Manager", she "was not part of a union nor [*sic*] a group of workers". AR at 4. Moreover, the record is devoid of any indication that the plaintiff was a "duly authorized representative". Nonetheless, the Department initiated an investigation, which

> revealed that the workers of the subject firm do not produce an article within the meaning of Section 222(3) of the Act. The * * * performance of services does not constitute production of an article, as required by Section 222 of the Trade Act of 1974; * * *. Therefore workers of the subject firm may be certified only if their separation was caused importantly by a reduced demand for their services from a parent firm, a firm otherwise related to the subject firm by ownership, or a firm related by control. In any case the reduction in demand for services must originate at a production facility whose workers independently meet the statutory criteria for certification and the reduction must directly relate to the product impacted by imports. These conditions have not been met for workers of the subject firm in this case. *Id.* at 26–27.

In support of the motion to dismiss, counsel for the defendant cite the above-quoted section of the Trade Act, as well as 19 U.S.C. § 2272, which sets forth the "group" eligibility requirements. In *Former Employees of USX Corporation* v. *United States,* 11 CIT ——, ——, 660 F. Supp. 961, 963 (1987), the court upheld a decision by the Department not to institute an investigation where a petition had been signed and filed by a lone worker, noting that it did

> not satisfy the requirements of the statute. Standing alone, Mr. Allen is not "a group of workers." Furthermore, his capacity as a millwright does not entitle him to file a petition as the group's "certified or recognized union or other duly authorized representative." 19 U.S.C. § 2271(a). Although the statute does not specify what constitutes a group of workers, in common meaning a "group" is not one individual, and the legislative history refers to a group of at least three workers, S.Rep. No. 1298, 93d Cong., 2d Sess. 132 * * *. In addition, the applicable regulation requires the signatures of three workers. The petition at issue not only lacks the two additional signatures, it lacks the names, addresses, telephone numbers, and dates of separation, of the other two petitioners as requested by the petition form.

Here, the Department did proceed with an investigation and did render a determination on the merits. And a single worker has the statutory right to seek judicial review of such a determination in this Court of International Trade. *See* 19 U.S.C. § 2395(a) and 28 U.S.C. § 2631(d)(1). However, standing to prosecute this appeal is

[1] Administrative record ("AR"), p. 3.

not synonymous with standing to achieve the substantive relief prayed for—under the Trade Act of 1974. Stated another way, the plaintiff had (and has) no standing to claim that relief[2], and defendant's motion to dismiss must therefore be granted.

Judgment will enter accordingly.

[2]The court notes in passing that, were there standing, review of the administrative record indicates that the Department's determination is supported by substantial evidence within the meaning of 19 U.S.C. § 2395(b).

ANNOUNCEMENT

Chief Judge Edward D. Re has announced the call of the Sixth Annual Judicial Conference of the United States Court of International Trade. The Conference is scheduled for Friday, November 3, 1989 in The Ballroom at Windows on the World, 106th Floor, One World Trade Center, New York, New York and will commence at 9:00 a.m.

The theme of the Conference is: "The United States Court of International Trade in the 1990's: The Continuing significance of Judicial Review in a Changing Environment."

Ambassador Thomas R. Pickering, The Permanent Representative of the United States of America to the United Nations, is the luncheon speaker.

The Honorable Peter W. Rodino, Jr., former Chairman, Committee on the Judiciary, United States House of Representatives, will present the Honorable Frank J. Guarini, Member of the Ways and Means Committee, United States House of Representatives, with the Court's Distinguished Service Award for his outstanding contributions to the administration of justice in the field of international trade law.

The Honorable Howard T. Markey, Chief Judge, United States Court of Appeals for the Federal Circuit, will be a special guest at the Conference.

The Conference will be attended by the Judges of the United States Court of International Trade, officials from the International Trade Commission, the Customs Service, the Departments of Justice, Commerce, and Treasury; members of the Bar of the Court; and other distinguished guests.

More than 400 lawyers, the largest single gathering in the United States of attorneys interested in the field of customs and international trade law, have participated in each of the past five Annual Judicial Conferences.

All interested persons are invited to attend. For further information, please write to:

USCIT Judicial Conference
c/o Office of the Clerk
United States Court of International Trade
One Federal Plaza
New York, New York 10007

Dated: October 2, 1989.

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